ARTICLE 4

PRISONERS OF WAR

❖ Text of the provision

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

  (a) that of being commanded by a person responsible for his subordinates;

  (b) that of having a fixed distinctive sign recognizable at a distance;

  (c) that of carrying arms openly;

  (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58–67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

❖ Reservations or declarations

High Contracting Parties for which a reservation is in force at the time of publication: Guinea-Bissau;[1] Viet Nam.[2] Germany rejected the statement of Guinea-Bissau as not being a valid reservation;[3] as did the United Kingdom

[1] United Nations *Treaty Series*, Vol. 920, p. 281:

> The Council of State of the Republic of Guinea-Bissau does not recognize the 'conditions' provided for in paragraph A (2) of this article concerning 'members of other militias and members of other volunteer corps, including those of organized resistance movements', because these conditions are not suited to the people's wars waged today.

The same reservation was made in relation to Article 13 of the First and Second Conventions.

[2] United Nations *Treaty Series*, Vol. 913, p. 176:

> The Provisional Revolutionary Government of the Republic of South Viet-Nam does not recognize the 'conditions' laid down in item (2) of this article concerning 'members of other militias and members of other volunteer corps, including those of organized resistance movements', because these conditions are not suited to cases of people's wars in the world of today.

[3] See United Nations *Treaty Series*, Vol. 970, p. 367, for Germany's response to the reservation of Guinea-Bissau:

and the United States in relation to the statements of both Viet Nam and Guinea-Bissau.[4]

Contents

A. Introduction 352
B. Historical background 353
C. Paragraph 4A: Persons who have fallen into the power of the enemy 356
1. The term 'fallen into the power of the enemy' 356
2. The term 'enemy' 357
D. Subparagraph 4A(1): Members of the armed forces of a Party to the conflict 360
1. The armed forces 360
2. Militias or volunteer corps forming part of the armed forces 361
3. Obligation to distinguish 363
4. Spies and saboteurs 364

> The reservation formulated in this connexion by the Republic of Guinea-Bissau concerning ... Article 4 (2) of the third Geneva Convention relative to the Treatment of Prisoners of War exceed, in the opinion of the Government of the Federal Republic of Germany, the purpose and intent of these Conventions and are therefore unacceptable to it. This declaration shall not otherwise affect the validity of the said Geneva Conventions under international law as between the Federal Republic of Germany and the Republic of Guinea-Bissau.

[4] See United Nations *Treaty Series*, Vol. 972, p. 403, for the United States' response to the reservation of Viet Nam:

> The reservations expressed with respect to the Third Geneva Convention go far beyond previous reservations, and are directed against the object and purpose of the Convention. Other reservations are similar to reservations expressed by others previously and concerning which the Government of the United States has previously declared its views. The Government of the United States rejects all the expressed reservations.
>
> The Government of the United States notes that the views expressed in this note should not be understood as implying any withdrawal from the policy heretofore pursued by its armed forces in according the treatment provided by the Conventions to hostile armed forces.

See United Nations *Treaty Series*, Vol. 970, pp. 367–368, for the United States' response to the reservation of Guinea-Bissau:

> The reservations are similar to the reservations expressed by others previously with respect to the same or different conventions and concerning which the government of the United States has previously declared its views. The attitude of the Government of the United States with respect to all the reservations by the Republic of Guinea-Bissau parallels its attitude toward such other reservations. The Government of the United States, while rejecting the reservations, accepts treaty relations with the Republic of Guinea-Bissau.

See United Nations *Treaty Series*, Vol. 995, pp. 395–396, for the United Kingdom's response to the reservations of both Viet Nam and Guinea-Bissau:

> In relation to the reservations made by the Provisional Revolutionary Government of the Republic of South Vietnam and the Republic of Guinea-Bissau to Article 4 of the Convention relative to the Treatment of Prisoners of War ... , the Government of the United Kingdom wish to state that they are likewise unable to accept those reservations.

5. Deserters and defectors 366
6. Mercenaries 367
E. Subparagraph 4A(2): Members of other militias or other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict 368
1. The requirement of 'belonging to' 369
2. The four conditions 372
a. Introduction 372
b. The individual or collective character of the requirement of compliance with the four conditions 373
c. First condition: Responsible command 373
d. Second condition: Fixed distinctive sign recognizable at a distance 374
e. Third condition: Carrying arms openly 375
f. Fourth condition: Conducting operations in accordance with the laws and customs of war 376
F. The significance of the four conditions for personnel covered by subparagraph 4A(1) 377
G. Subparagraph 4A(3): Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power 383
H. Subparagraphs 4A(4) and (5): Civilian prisoners of war 384
1. Differences between civilian and military prisoners of war 384
2. Subparagraph 4A(4): Persons accompanying the armed forces without being members thereof 384
a. General 384
b. Private military and security companies 386
3. Subparagraph 4A(5): Members of the merchant marine and crews of civil aircraft of the Parties to the conflict 387
I. Subparagraph 4A(6): *Levée en masse* 389
1. Introduction and historical background 389
2. The conditions for a *levée en masse* 390
a. Temporal scope of a *levée en masse* 390
b. The condition of spontaneity 391
c. The condition to carry arms openly 391
d. The condition to respect the laws and customs of war 391
J. Paragraph 4B: Persons in occupied or neutral territories 391
1. Subparagraph 4B(1): Armed forces of an occupied country 392
2. Subparagraph 4B(2): Internment by neutral Powers 392
a. Introduction 392
b. Historical background 393
c. Persons covered by Article 4B(2) 394

d. Neutral or non-belligerent Powers 395
e. Obligations of the neutral Power 396
K. Paragraph 4C: Medical personnel and chaplains 399
Select bibliography 399

A. Introduction

947 Article 4 defines who is a 'prisoner of war' and identifies the persons entitled to the protection of the Third Convention.[5] Article 4A lists the categories of persons who, if they fall into the power of the enemy, are prisoners of war. It includes members of the armed forces, members of 'irregular' armed forces that belong to a Party to the conflict, and persons who take up arms spontaneously in response to an invading army (*levée en masse*). It also includes certain categories of civilians authorized to accompany the armed forces during conflict, such as supply contractors, as well as members of the merchant marine and the crews of civilian aircraft. All such persons are protected by the Third Convention from the moment they fall into the power of the enemy until their final release and repatriation.[6]

948 Article 4A mirrors the list of protected persons in Article 13 of the First and Second Conventions, which provides protection for the wounded, sick and shipwrecked. Wounded, sick and shipwrecked persons covered by the First or Second Convention who fall into the power of the enemy are simultaneously protected by the First or Second Convention and the Third Convention.[7]

949 Article 4B extends the protection of the Third Convention to past and present members of the armed forces who have been reinterned in occupied territory, and to persons who fall within the categories listed in 4A but have been received by a neutral or non-belligerent Party.

950 In addition to providing the personal scope of application of the Third Convention, Article 4 is relevant to the definition of 'combatants'.[8] Members of the armed forces (including members of militias or volunteer corps forming part of the armed forces) under subparagraphs 4A(1) and (3); members of other militias and volunteer corps including organized resistance movements under subparagraph 4A(2); and participants in a *levée en masse* covered by subparagraph 4A(6) are combatants. All are entitled to prisoner-of-war status if they fall into the power of the enemy.[9] Persons accompanying the armed forces under

[5] The Third Convention protects other persons besides prisoners of war, in particular retained medical and religious personnel, but not on the basis of prisoner-of-war status; see Article 33.
[6] Article 5(1).
[7] For details, see First Convention, Article 14, and Second Convention, Article 16.
[8] For a definition of 'combatants', see Additional Protocol I, Article 43(2). See also ICRC Study on Customary International Humanitarian Law (2005), Rule 3.
[9] Ipsen, p. 82. See also Canada, *LOAC Manual*, 2001, Glossary, p. GL-3; Central African Republic, *Instructor's Manual*, 1999, Fascicule 1, chapter II, section I, para. 2; and Russian Federation, *Regulations on the Application of IHL*, 2001, para. 1.

subparagraph 4A(4) and the crews referred to in subparagraph 4A(5) are civilians, but they are also entitled to prisoner-of-war status if they fall into enemy hands.

951 Military medical personnel and chaplains are an express exception to the rule that members of the armed forces are prisoners of war if they fall into enemy hands. Should such persons fall into the power of the enemy, they are not prisoners of war but must 'receive as a minimum the benefits and protection of the [Third] Convention' while being retained.[10]

B. Historical background

952 The development of the modern definition of prisoner of war began in the nineteenth century.[11] In an effort to clarify the laws and customs applicable to the US armies fighting against the Confederate States of America in the American Civil War (1861–1865), Francis Lieber drew up what is now known as the Lieber Code. This was the first instrument to contain a clear articulation of which persons were entitled to protection as prisoners of war, and which were not. It provided that, among others, all members of the armed forces, 'all men who belong to the rising en masse of the hostile country', and persons belonging to groups attached to the army must be protected as prisoners of war.[12] It expressly excluded persons fighting 'without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war'.[13] Such persons were not 'entitled to the privileges of prisoners of war' but were to 'be treated summarily as highway robbers or pirates'.[14]

953 In Europe, the question how such protection should extend to so-called 'irregular' fighters was particularly relevant to French fighters known as *franc-tireurs*. These were not members of the armed forces but were nevertheless called up by the French government to fight on its behalf during the Franco-Prussian War (1870–1871). Upon capture, those found bearing arms who were not wearing uniform and not able to produce clear evidence of a special authorization from the French government were summarily executed.[15]

954 To clarify the emerging customs of war, 15 States gathered in Brussels in 1874, where a lively debate took place concerning the status of irregular or 'unorganised forces, without a superior commanding officer, without direction, without rules, led on only by a patriotic impulse [and who] could not observe the laws and customs of war of which they are ignorant'.[16] France, supported by smaller

[10] See Article 33 and paras 1091–1092 of this commentary. See also First Convention, Article 28(2).
[11] This development coincided with the formalization of armed forces: providing soldiers with a regular income decreased pillage and enhanced the ability to impose stricter discipline; Lynn II, p. 109. See also Childs, p. 158.
[12] Lieber Code (1863), Articles 49, 50 and 81–84.
[13] *Ibid.* Article 82.
[14] *Ibid.*
[15] See Spaight, pp. 41–44, and Levie, p. 44.
[16] Spaight, p. 50.

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European nations which were unable to raise and equip large professional standing armies, sought legal recognition for citizens 'bearing arms in defence of [their] country'.[17] This was opposed by Germany, which considered that irregular forces led to military escalation and reprisals and should therefore be outlawed.[18]

955 The Brussels Declaration ultimately provided that not only captured members of regular armed forces were entitled to prisoner-of-war status, but also captured members of militias and volunteer corps fulfilling four criteria: '1. That they be commanded by a person responsible for his subordinates; 2. That they have a fixed distinctive emblem recognizable at a distance; 3. That they carry arms openly; and 4. That they conduct their operations in accordance with the laws and customs of war.'[19] These are essentially the same criteria that were adopted in the Third Geneva Convention in 1949 in relation to 'other' militias and volunteer corps under subparagraph 4A(2). The Brussels Declaration also recognized as belligerents persons who took up arms in a *levée en masse*, provided that they respected the laws and customs of war.[20]

956 The Brussels Declaration never became a binding treaty but its definition of prisoner of war was adopted essentially unchanged at the 1899 Hague Peace Conference.[21] The 1907 Hague Regulations included the same definition, but added carrying arms openly as a condition for the recognition of persons taking part in a *levée en masse*.[22] During the First World War, States concluded bilateral agreements elaborating or expanding on the categories of persons entitled to prisoner-of-war status.[23] The 1929 Geneva Convention on Prisoners of War referred to the definitions in the 1907 Hague Regulations, and specified that the Convention also applied to all persons captured in the course of operations of maritime or aerial war.[24]

957 The experiences of the Second World War highlighted the need for further clarification of the definition of 'prisoners of war'.[25] The sheer number of 'irregular' forces gave the issue particular importance.[26] While it was accepted

[17] *Ibid.*
[18] *Ibid.* pp. 49–50.
[19] Brussels Declaration (1874), Article 9.
[20] *Ibid.* Article 10.
[21] Hague Regulations (1899), Annex, section I, chapter I.
[22] Hague Regulations (1907), Articles 1–3.
[23] See e.g. Agreement between France and Germany concerning Prisoners of War (1918), Articles 55–56, and Agreement between the United States of America and Germany concerning Prisoners of War, Sanitary Personnel and Civilians (1918), Article 139.
[24] Geneva Convention on Prisoners of War (1929), Article 1. See also *Proceedings of the Geneva Diplomatic Conference of 1929*, pp. 444–448 and 460–461. The First World War saw the widespread killing of survivors of naval attacks; see Gillespie, p. 169.
[25] See e.g. Bretonnière, pp. 2–19.
[26] For example, it is estimated that during the Second World War 250,000 Soviet personnel were directly engaged in partisan operations by 1944. The summary execution of partisans was a common practice. See Caming, pp. 18–19; John Erickson, *The Road to Berlin: Continuing the History of Stalin's War with Germany*, Westview, Boulder, Colorado, 1983, p. 114; and Earl F. Ziemke, *Stalingrad to Berlin: The German Defeat in the East*, Center of Military History, Washington, D.C., 1968, pp. 30, 103–105 and 303–308.

that members of the regular armed forces would continue to be entitled to protection as prisoners of war, the notion of granting the same protection to irregular armed forces remained contentious. During the preparatory work for the Diplomatic Conference in 1949, and even during the Conference itself, two schools of thought emerged.[27] Some delegates considered that irregular armed forces should have to fulfil even stricter conditions than the four specified in the Hague Regulations in order to benefit from the protection of the new Convention. Others considered that greater latitude should be allowed, to extend protection more widely to irregular forces. Some also expressed concern that establishing certain conditions for irregular forces might affect the protection of participants in a *levée en masse*.[28]

958 The list of persons entitled to prisoner-of-war status ultimately agreed on for the Third Convention is broader than that of 1907. For example, at the Conference of Government Experts in 1947, it was explicitly clarified that members of militias or volunteer corps that belong to a Party to the conflict and that fulfil the four specified conditions fall within the definition, even if operating in occupied territory.[29] Furthermore, the definition was designed to address certain situations where previously some States had maintained a narrow interpretation of prisoner-of-war status. This included express mention of members of armed forces who profess allegiance to governments or authorities not recognized by the Detaining Power, as well as the particular case of members or former members of the armed forces reinterned in occupied territory.[30]

959 The Third Convention did not completely settle the debates about who is entitled to prisoner-of-war status. Since its adoption, the ICRC has on various occasions seen States differ on who is entitled to that status and/or urged States to grant such status.[31] In light of developments since 1949, in particular the emergence of so-called 'guerilla' warfare, the issue was re-examined and further developed in Additional Protocol I in 1977.[32] Where the Protocol applies, its rules have to be taken into account alongside the Convention. However, the Protocol recognizes that its application is without prejudice 'to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention'.[33]

[27] *Report of the Conference of Government Experts of 1947*, p. 105; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-A, pp. 239–243.
[28] *Report of the Conference of Government Experts of 1947*, pp. 105 and 109–110; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-A, pp. 239–240.
[29] *Report of the Conference of Government Experts of 1947*, pp. 108–109.
[30] *Ibid.* p. 111.
[31] See e.g. ICRC, *Annual Report 1972*, ICRC, Geneva, pp. 50 and 65; *Annual Report 1978*, ICRC, Geneva, pp. 11 and 26; and *Annual Report 1982*, ICRC, Geneva, p. 58.
[32] See Additional Protocol I, Articles 43–44.
[33] *Ibid.* Article 44(6).

C. Paragraph 4A: Persons who have fallen into the power of the enemy

1. The term 'fallen into the power of the enemy'

960 Article 4A concerns six categories of persons who have fallen into the power of the enemy. The term 'fallen into the power of the enemy' is new in the 1949 Conventions; the 1899 and 1907 Hague Regulations and the 1929 Geneva Convention on Prisoners of War referred to persons 'captured' by the enemy. The new term was introduced to make it clear that the Third Convention protects not only 'captured' prisoners of war, but also those who have fallen into the power of the enemy by other means, such as surrender or mass capitulation.[34]

961 To have fallen into the power of the enemy in the sense of Article 4 of the Third Convention implies that the Detaining Power exercises some level of physical control or restraint over the person, and that the person is no longer willing or able to participate in hostilities or defend themselves. It would thus not include persons who merely reside or operate in a territory controlled by a belligerent Party.[35]

962 The Third Convention appears to use 'fallen into the power of' and 'fallen into the hands of' the enemy interchangeably.[36] The two expressions are also inconsistently translated between the equally authentic French and English versions of the text.[37] This suggests that no specific, technical meaning should be inferred for either expression. Taking note of the drafting history of Article 4, the usual scenario will be when an individual is captured or surrenders, including when they are wounded and tended to or cared for by the adverse Party.[38] There may be situations, however, in which persons have surrendered and are

[34] *Draft Conventions adopted by the 1948 Stockholm Conference*, p. 54; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 237. See also Levie, pp. 34–35; Central African Republic, *Instructor's Manual*, 1999, Fascicule 2, chapter III, section I; Peru, *IHL Manual*, 2004, paras 109(a) and 33(a)(2); and United States, *Law of War Manual*, 2016, p. 542, para. 9.3.4.2. Notwithstanding the clarification provided by this term, in one recent international armed conflict a Party considered that the fact of surrender meant that a person could not be considered a prisoner of war.

[35] Watts, p. 892, para. 9.

[36] For example, Articles 4 and 5(1) refer to persons who have 'fallen into the power of the enemy', while Article 5(2) refers to persons 'having fallen into the hands of the enemy'.

[37] For example, the English version of Article 12 refers to persons 'in the hands of the enemy', while the French refers to those 'au pouvoir de la Puissance ennemie' ('in the power of the enemy Power'). There are many instances of this. See e.g. First Convention, Articles 14, 16, 28, 32, 33, 42 and 43; Second Convention, Articles 16, 19, 29 and 37; Third Convention, Article 12; and Fourth Convention, Articles 4, 29, 32, 36, 41 and 42.

[38] Wounded enemy personnel in the care of local inhabitants or relief organizations acting in response to a request by and under the direction or control of the military authorities must be considered to have fallen into the hands of the enemy and to be prisoners of war; see the commentary on Article 18 of the First Convention, para. 1739. See also United States, *Law of War Manual*, 2016, p. 542, para. 9.3.4.2.

hors de combat but have not fallen into the power of the enemy and would therefore not be prisoners of war.[39]

963 In many instances, the Third Convention refers to persons 'captured' by the Detaining Power.[40] In view of the above, such references must be read to mean persons 'having fallen into the power of the enemy' by any means.

2. The term 'enemy'

964 The term 'enemy' refers to the enemy State, namely the adversary State during an international armed conflict arising between two or more High Contracting Parties. While Article 4 provides a protective status that attaches to individuals, the obligations are equally owed to the State. The question of the role of an individual's nationality in determining their prisoner-of-war status in this inter-State regime has arisen, particularly in relation to individuals who are nationals of the Detaining Power but are serving in enemy armed forces. There are diverging interpretations by States, including in the case law and doctrine.

965 One view is that any person in one of the categories enumerated in Article 4A who falls into the power of the adversary State is in the power of the enemy, regardless of their nationality. According to this view, prisoners of war who have the nationality (or dual nationality) of the Detaining Power, as well as stateless persons, are entitled to the full protection due to them under the Third Convention, including recognition that they cannot be prosecuted for lawful acts of war.[41]

966 Another view is that the term 'enemy' excludes a situation in which a person is interned by the same State of which they have citizenship.[42] Lauterpacht, for example, considers that 'traitorous subjects of a belligerent' who fight in the armed forces of the enemy are not entitled to 'the privileges of members of the armed forces' and are instead to be treated as criminals.[43]

967 Practice with respect to the status or treatment of own nationals by Detaining Powers is mixed. Some States' military manuals expressly confirm that nationality is of no consequence for prisoner-of-war status,[44] others

[39] This may be the case when soldiers seek to surrender to aircraft. On this point, see Manual on International Law Applicable to Air and Missile Warfare (2009), commentary on Rule 15(b), and Henckaerts/Doswald-Beck, commentary on Rule 47, pp. 168–169. For further details, see the commentary on Additional Protocol I, Article 41(3).

[40] For example, Articles 12, 14, 21, 22, 27, 59, 70 and 85. Articles 70 and 71 refer to 'capture cards'.

[41] See the commentary on Article 99, paras 3956–3959. See Toman, pp. 285–286; W. Hays Parks, 'Combatants', *International Law Studies*, U.S. Naval War College, Vol. 85, 2009, pp. 247–306, at 272; and David, p. 595, paras 2.325–2.326. Writing in 1942, William Flory stated that if the individual was a naturalized citizen of the belligerent Power at the time of falling into enemy hands, they would be entitled to prisoner-of-war status: William Evans Sherlock Flory, *Prisoners of War: A Study in the Development of International Law*, American Council on Public Affairs, University of Michigan Press, 1942, pp. 29–30.

[42] See e.g. Rosas, p. 410; Dinstein, p. 47; and Maia/Kolb/Scalia, p. 66.

[43] Lauterpacht, p. 268.

[44] See e.g. Canada, *LOAC Manual*, 2001, p. 10-2, para. 1009; Chile, *Operational Law Manual*, 2009, p. 2-52; and Netherlands, *Military Manual*, 2005, p. 38.

expressly exclude persons of the same nationality as the Detaining Power from prisoner-of-war status,[45] and yet others do not specify one way or the other.[46] Acknowledging the issue without opining, the UK Law of War Manual states that '[i]t is not clear whether captives of the nationality of the detaining power are entitled to [prisoner-of-war] status'.[47]

968 Case law also shows different interpretations. In *Quirin* in 1942, for example, the US Supreme Court considered that '[c]itizens who associate themselves with the military arm of the enemy government ... are enemy belligerents within the meaning of the [Fourth] Hague Convention [of 1907] and the law of war'.[48] In *Territo*, the US Court of Appeal cited *Quirin* and maintained a finding that a person was a prisoner of war of the United States notwithstanding the fact that he was a US citizen.[49] In *Koi* in 1968, on the other hand, the UK Privy Council adopted Lauterpacht's view,[50] and considered that the exclusion of one's own nationals from prisoner-of-war status is implicit from Articles 87 and 100 of the Third Convention.[51]

969 Historical examples of battlefield practice also show divergence: for example, the Free French Army accorded prisoner-of-war status to French soldiers of German-occupied Vichy France;[52] whereas British citizens who fought as part of the British Free Corps for Germany and Soviet citizens who fought as part of

[45] See e.g. Belgium, *Law of War Manual*, 1983, p. 23, para. 5; Nigeria, *Military Manual*, 1979, p. 16; and United States, *Law of War Manual*, 2016, p. 109, para. 4.4.4.2, p. 115, para. 4.5.2.6, and p. 540, para. 9.3.2.1, and *Commander's Handbook on the Law of Land Warfare*, 2019, pp. 1-12–1-13, para. 1-53. See also Japan, *Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations*, 2004, Article 3(v).

[46] New Zealand excludes from prisoner-of-war status 'members of the armed forces who go over to the enemy' but does not mention nationality as an element; *Military Manual*, 2019, Vol. 4, pp. 6-10–6-11, para. 6.3.26.

[47] United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 187, fn. 340. The United Kingdom's *Joint Doctrine Captured Persons*, 2015, makes no mention of the nationality of prisoners of war.

[48] United States, Supreme Court, *Quirin case*, Judgment, 1942, pp. 37–38. The current US military manual, however, expressly excludes persons of the same nationality as the Detaining Power from prisoner-of-war status; *Law of War Manual*, 2016, pp. 540–541, para. 9.3.2.1.

[49] United States, Court of Appeals for the Ninth Circuit, *Territo case*, Judgment, 1946, p. 145. The Court stated that on careful review of the authorities, 'we have found none supporting the contention of [the] petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle'.

[50] United Kingdom, Privy Council, *Koi case*, Judgment, 1967, pp. 856–858.

[51] Article 87 provides in relation to the sentencing of prisoners of war that 'the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance'. Article 100, in relation to the death penalty, requires that the court's attention be drawn to the fact that the accused is not a national of the Detaining Power and is therefore not bound by any duty of allegiance.

[52] Germany also recognized as prisoners of war Czech soldiers fighting for Great Britain at the time the then Czechoslovakia was annexed by Germany; see Thomas, pp. 87–118, and Wilhelm, pp. 687–688.

German forces during the Second World War were denied prisoner-of-war status.[53]

970 Acknowledging this diversity of practice and views, the ICRC considers that nationality should not be a factor in the determination of prisoner-of-war status for the reasons outlined below.

971 The text of Article 4 does not stipulate nationality as a factor for prisoner-of-war status, in contrast to protected person status under the Fourth Convention. The criterion should likewise not be inferred from the text of other relevant articles in the Third Convention. Articles 87 and 100 of the Convention mention nationality and reflect a presumption on the part of the drafters that in most cases prisoners of war will be nationals of the State on which they depend.[54] The articles encourage clemency in these circumstances, given that each Party to a conflict requires the allegiance of its armed forces and, therefore, prisoners of war should not be punished for their allegiance to the State on which they depend. Articles 87 and 100 should be understood as protective provisions, and neither should be seen as adding a constitutive element for prisoner-of-war status beyond the criteria expressly provided for in Article 4. Lastly, the Convention refers throughout to the Power on which the prisoner 'depends', and not to the Power of nationality.[55]

972 Granting prisoner-of-war status to a State's own nationals does not exclude the possibility of prosecuting such individuals for treason, meaning that there is no need to deny such status in order to punish this or similar acts.[56] Levie states that the rule is that

> any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality; subject to the right of the Detaining Power to charge him with treason, or a similar type of offense, under its municipal law and to try him in accordance with the guarantees contained in the relevant provisions of the Convention.[57]

[53] Debuf, p. 219, and Donna E. Dismukes, 'The Forced Repatriation of Soviet Citizens: A Study in Military Obedience' (thesis), Naval Postgraduate School, Monterey, 1996, p. 24.
[54] See also Tse, pp. 404–405.
[55] Articles 66, 68, 91, 94, 119 and 122; See also Annex IV.B of the Third Convention and the model capture card. Provisions relating to the country of origin of prisoners of war also indicate an understanding that the Power on which they depend and the country of origin are not necessarily the same; see e.g. Article 123.
[56] Levie, pp. 75–76; Rogers, pp. 107–108 and 123; Wilhelm, p. 686. Such prosecution would be subject to the protection provided in Part III, Section VI, Chapter III of the Convention. See also Richard R. Baxter, 'The Privy Council on the Qualifications of Belligerents', *American Journal of International Law*, Vol. 63, No. 2, April 1969, pp. 290–296, at 291–294, and United Kingdom, House of Lords, *Joyce case*, Appeal Decision, 1946, p. 368.
[57] Levie, p. 76.

973 In an era where dual nationality is common, there is a risk of seriously undermining the protective power of the Convention if prisoner-of-war status is routinely denied on this basis.[58]

974 It should be underscored that the question of the impact of nationality on prisoner-of-war status is limited to 'own' nationals of a Detaining Power. That is to say, the fact that an individual is a national of a third State and not a national of the armed forces in which they are serving (nor a national of the adversary) is widely considered to be irrelevant when it comes to determining prisoner-of-war status.[59]

D. Subparagraph 4A(1): Members of the armed forces of a Party to the conflict

1. The armed forces

975 The first subcategory of prisoners of war under Article 4A consists of members of the armed forces of a Party to the conflict, including members of militias or volunteer corps forming part of the armed forces. These are likely to constitute the most significant category of prisoners of war and historically the least controversial of the subcategories of Article 4A.[60]

976 The expression 'members of the armed forces' refers to all military personnel under a command that is responsible to a Party to the conflict. The term 'armed forces' replaced the term 'army' used in Article 1 of the 1899 and 1907 Hague Regulations, broadening the scope to include all branches of the armed forces.[61]

977 The requirements for membership in the armed forces are not prescribed in international law. Rather, it is a matter of domestic regulation.[62] Whether a reservist is a member of the armed forces of a Party to the conflict also depends

[58] In this regard, it is worth noting that some States whose legislation reserves prisoner-of-war status only to foreign nationals do not accept dual citizenship. See also Levie, p. 75, fn. 301, who notes that '[d]ual citizenship in the two opposing belligerents would also present a problem under Lauterpacht's thesis'.

[59] See Lauterpacht, p. 255: 'It is likewise irrelevant to consider the composition of a regular army, whether it is based on conscription or not, whether foreigners as well as subjects are enrolled, and the like.' For a specific rule in relation to the crews of the merchant marine and of civil aircraft of the Parties to the conflict, see paras 1056–1057 of this commentary.

[60] See also Watts, p. 893.

[61] The exceptions in Article 1, para. 2, of the 1929 Convention in relation to armed forces captured 'in the course of operations of maritime or aerial war' were also removed.

[62] For example, the US armed forces include the National Guard and the Coast Guard; United States, *Law of War Manual*, 2016, p. 111, para. 4.5.1. In Germany, the term 'armed forces' includes 'all formations that constitute the armed instrument of a Party to a conflict, regardless of whether these form part of the regular forces of a State or not'; Germany, *Military Manual*, 2013, paras 307 and 309. The manual furthermore states, para. 310, that '[i]nternational law does not specify which persons belong to the regular forces of a Party to a conflict. It leaves this decision to national authorities and subsequently treats it as a legal fact'. See also Ipsen, p. 85; Levie, p. 36; Maia/Kolb/Scalia, p. 23; Rosas, p. 329; and Watts, p. 893.

on domestic law.[63] In this regard, a distinction needs to be made between reservists on active duty, who will be considered members of the armed forces for the purposes of Article 4A(1), and those who are not on active duty, who will not be so considered.[64]

978 The expression 'members of the armed forces' includes all members of the armed forces regardless of their function or the service they provide. For example, it can include members of the armed forces providing support services.[65] It should be recalled that military medical personnel and chaplains constitute a distinct subset of the armed forces.[66] If they fall into the power of the enemy and are retained by the Detaining Power, they are not considered prisoners of war but must at least receive the benefits and protections of the Third Convention.[67]

2. *Militias or volunteer corps forming part of the armed forces*

979 Subparagraph 4A(1) expressly includes militias or volunteer corps forming part of the armed forces. For such groups to fall within subparagraph 4A(1), they must have been formally incorporated into the armed forces prior to falling into enemy hands and must be under the responsible command of a Party to the conflict. How they are incorporated depends on the domestic law of the State in question.[68] Nevertheless, it must be carried out in good faith and may not be done retroactively.

[63] For example, Australia, Canada, the United Kingdom and the United States have defined the 'armed forces' as including their reserves. Mexico and Spain, on the other hand, provide for a system of activation, after which point the reserves become incorporated into the armed forces. Nigeria's legislation provides for the transfer of persons from the armed forces to the reserves. See also Australia, *Defence Act*, 1903, as amended, sections 17, 19(3) and 20(3) (but see also section 116A(3)); Canada, *LOAC Manual*, 2001, para. 304; Mexico, *Law on the Mexican Army and Air Force*, 1986, as amended, Article 184; Nigeria, *Armed Forces Act*, 2004, Part X, section 33; Spain, *Organic Law on the Armed Forces*, 2011, Preamble III and Article 52; United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 40, para. 4.3.5; and United States, *Law of War Manual*, 2016, p. 111, para. 4.5.1.

[64] See e.g. Australia, *Defence Act*, 1903, as amended, sections 17, 19(3) and 20(3) (but see also section 116A(3)); Mexico, *Law on the Mexican Army and Air Force*, 1986, as amended, Article 184; Nigeria, *Armed Forces Act*, 2004, Part X, section 33; and Spain, *Organic Law on the Armed Forces*, 2011, Preamble III and Article 52. See also Dinstein, p. 176, and Krähenmann, p. 378.

[65] See e.g. Denmark, *Military Manual*, 2016, p. 163; Germany, *Military Manual*, 2013, paras 307 and 312; Netherlands, *Military Manual*, 2005, para. 305; Republic of Korea, *Operational Law Manual*, 1996, p. 43; and Russian Federation, *Military Manual*, 1990, paras 12–13. See also ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, by Nils Melzer, ICRC, Geneva, 2009, p. 25.

[66] See First Convention, Article 24.

[67] First Convention, Articles 28 and 30; Third Convention, Articles 4C and 33(1). For a further discussion, see section K.

[68] For example, the military manual of the Netherlands states that 'in September 1944, the armed "recognized["] resistance groups, the Orde Dienst (Order of Service), the Knokploegen (Assault Groups) and the Raad van Verzet (Council of Resistance) were grouped together into the Binnenlandse Strijdkrachten (Inland Armed Forces)' and '[m]embers were given the status of soldiers of the Royal Dutch Army'; *Military Manual*, 2005, p. 31, para. 0303. See also Denmark, *Military Manual*, 2016, p. 161, para. 2.1, which provides that the Danish Home Guard forms part of Denmark's regular armed forces.

980 The term 'armed forces' encompasses all groups and persons incorporated into the armed forces. Notwithstanding this, it was considered useful to make express reference to 'militias or volunteer corps forming part of the armed forces' given that certain States had militias and volunteer corps which, although part of the armed forces, were quite distinct from the army as such.[69] Members of militias or volunteer corps that are not incorporated into the armed forces but otherwise belong to a Party to the conflict fall under subparagraph 4A(2), provided that the four conditions set out in that subparagraph are fulfilled.[70]

981 Paramilitary and armed law enforcement agencies may also form part of the armed forces of a State under the domestic law of that State.[71] The Third Convention does not say whether a Party to a conflict must notify the adversary of the incorporation of its paramilitary or police forces into the armed forces. Nor does it say anything more generally on notification of the signs that a State should employ to distinguish its forces. That said, it is the duty of each State to take steps to ensure that members of its armed forces can be immediately recognized and that they are easily distinguishable from members of the enemy armed forces and from civilians. This duty is particularly important where police forces are concerned. Police forces are often not part of the armed forces and serve a different role, namely to preserve law and order within the State through the law enforcement framework.[72] However, some States have police forces, such as 'gendarmerie', that are formally part of the armed forces but may also serve as police in a civilian setting. Notifying the adversary that the police or other paramilitary organizations are thus incorporated could serve as a useful means of distinguishing the armed forces of a State from its civilian police forces.

982 Article 43(3) of Additional Protocol I expressly requires Parties to a conflict to notify each other of the incorporation of police forces into their armed forces. This notification is not constitutive of the status of such units but serves to avoid confusion and thus enhance respect for the principle of distinction.[73]

[69] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 52.
[70] For a further discussion, see section E.
[71] For example, Spain's *Organic Law on National Defence*, 2005, Article 23, provides for the incorporation of the Guardia Civil, and China, *Military Service Law of the People's Republic of China*, 1984, as amended, provides for the incorporation of the armed police force into the armed forces. See also Côte d'Ivoire, *Teaching Manual*, 2007, Vol. III-1, para. I.3; Germany, *Military Manual*, 2013, para. 313 (noting that Germany is not currently incorporating paramilitary or armed law enforcement agencies into its armed forces, unlike what is said in its *Military Manual*, 1992, para. 307); and Netherlands, *Military Manual*, 2005, paras 0303, 0311 and 0314. Where a State has given the police force a combat function but has not formally incorporated it into its armed forces, members of the police force may still be classified as prisoners of war under Article 4A(2), provided that the four conditions discussed in section E.2.c–f are met.
[72] David, p. 567; Ipsen, p. 88.
[73] Henckaerts/Doswald-Beck, commentary on Rule 5, p. 17.

Both Belgium and France issued general notifications to this effect upon ratification of Additional Protocol I.[74]

3. Obligation to distinguish

983 To enhance the protection of civilians, members of the armed forces must distinguish themselves from the civilian population during military operations. Under customary international humanitarian law, the failure of individual combatants to distinguish themselves while engaged in an attack or in a military operation preparatory to an attack means they forfeit the right to prisoner-of-war status.[75] The purpose of such a requirement is to maximize the distinction between civilians and combatants and thereby enhance the protection of the civilian population.[76] Traditionally, this requirement poses no problem for State armed forces, as they normally wear uniforms.[77]

984 The Convention does not establish specific requirements for uniforms or the elements they must comprise, nor does it provide for any reciprocal notification of uniforms or insignia, as it does for ranks (see Article 43(1)). What is essential is that, no matter what they look like, uniforms must be sufficient to distinguish members of the armed forces from civilians to facilitate respect for the principle of distinction.

[74] Belgium, Interpretative declarations made upon ratification of Additional Protocol I, 20 May 1986, para. 2; France, Reservations and declarations made upon ratification of Additional Protocol I, 11 April 2001, para. 7.

[75] ICRC Study on Customary International Humanitarian Law (2005), Rule 106. See e.g. United Kingdom, Judicial Committee of the Privy Council, *Ali case*, Appeal Judgment, 1968, in which the Privy Council considered that a member of the Indonesian armed forces was not entitled to prisoner-of-war status after planting a bomb in an office building in Singapore while in civilian clothing during an armed conflict. See also Cameroon, *Disciplinary Regulations*, 2007, Article 30; Côte d'Ivoire, *Teaching Manual*, 2007, Vol. III-1, pp. 27–29 and 46; Greece, *Internal Service Code of the Hellenic Territorial Army*, 1984, Article 14(a); Russian Federation, *Regulations on the Application of IHL*, 2001, para. 1; United Kingdom, *Manual of the Law of Armed Conflict*, 2004, pp. 43–44, para. 4.6; and United States, *Air Force Pamphlet*, 1976, para. 3-2(b)(3). See also Sassòli, 2019, p. 251, para. 8.58. Some States consider that the obligation to distinguish extends for longer than the period set out in Rule 106 of the 2005 ICRC Customary International Humanitarian Law Study and covers the group as a whole (see e.g. United States, *Law of War Manual*, 2016, p. 207, para. 5.4.8.2), whereas others consider that under the Third Convention, 'members of the regular armed forces operating in civilian clothes would not forfeit combatant and prisoner-of-war status though, if they carried out offensive operations in civilian clothes, they might commit the war crime of treachery for which they could be tried': Rogers, p. 114 (citing Article 23(b) of the 1907 Hague Regulations concerning the war crime of treachery).

[76] See Additional Protocol I, Article 43(3), first sentence, and Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 1695. See also United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 41, para. 4.4.1, and United States, *Law of War Manual*, 2016, pp. 206–207, paras 5.4.8 and 5.4.8.1.

[77] See also Additional Protocol I, Article 44(7). See also e.g. Belgium, *Law of War Manual*, 1983, p. 20; Colombia, *Instructor's Manual*, 1999, p. 16; Germany, *Military Manual*, 2013, p. 39, para. 304; Kenya, *LOAC Manual*, 1997, *Précis No. 2*, p. 8; Madagascar, *Military Manual*, 1994, Fiche no. 2-SO, para. A; Netherlands, *Military Manual*, 2005, para. 0306; South Africa, *LOAC Manual*, 1996, para. 26; Sweden, *IHL Manual*, 1991, p. 36, para. 3.2.1.4; and United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 145, para. 8.5.1.

985 Some States have expressed the view that part of their regular armed forces may wear a 'non-standard uniform' as long as they still distinguish themselves from the civilian population.[78] As long as these persons remain recognizable as members of the enemy armed forces, this practice may be accepted. If, however, non-standard uniforms do not amount to uniforms at all, i.e. because they lack a fixed, distinctive sign recognizable at a distance, members of armed forces thus clad risk being denied prisoner-of-war status.

986 The fact that this obligation only applies during a military operation reflects the understanding that members of armed forces do not always have to wear their uniforms. For example, being captured in camp when not wearing a uniform (such as while tending to personal hygiene) would not be a ground to deny a person prisoner-of-war status.[79]

987 If members of regular armed forces do not wear a uniform while engaged in a military operation, they risk being charged as spies or saboteurs and may be deprived of prisoner-of-war status (see section D.4). Depending on the circumstances, such military operations carried out in civilian clothes could constitute perfidy.[80]

4. Spies and saboteurs

988 While Article 4 does not expressly address the issue of spies, it is a long-standing rule of customary international law that combatants captured while engaged in espionage are not entitled to prisoner-of-war status.[81] This includes combatants who engage in espionage while wearing civilian attire or the uniform of the adversary but excludes combatants who are gathering information while wearing their own uniforms.[82] Espionage during times of armed

[78] See United States, *Law of War Manual*, 2016, p. 112, para. 4.5.2.1. See also Denmark, *Military Manual*, 2016, p. 165, and New Zealand, *Military Manual*, 2019, Vol. 4, p. 8-38, para. 8.10.16. See also Dinstein, p. 52 (combatants must 'retain some distinctive feature telling them apart from civilians'), and Parks, pp. 512–513 ('Military personnel wearing nonstandard uniform or civilian clothing are entitled to prisoner of war status if captured. Those captured wearing civilian clothing may be at risk of denial of prisoner of war status and trial as spies.')

[79] See e.g. Denmark, *Military Manual*, 2016, p. 164:

> [M]ilitary operations preparatory to an attack must be understood rather broadly to comprise any preparatory military activity but also ordinary patrolling or any other visible presence outside military camps in the area of conflict. However, this principal rule also points out that armed forces, including Danish armed forces, may appear out of uniform away from the battlefield. This applies, for example, to secluded camps in which the individual is not standing guard or working on imminent or ongoing military combat operations.

[80] On perfidy, see Additional Protocol I, Article 37(1), which prohibits killing, injuring or capturing an adversary by resort to perfidy, including, for example, by feigning civilian status. See also ICRC Study on Customary International Humanitarian Law (2005), Rule 65; Denmark, *Military Manual*, 2016, p. 166; and New Zealand, *Military Manual*, 2019, Vol. 4, p. 8-37, para. 8.10.15 (in relation to special operation forces operating behind enemy lines while disguised as civilians or while wearing the uniform or insignia of the opposing force or a neutral force).

[81] ICRC Study on Customary International Humanitarian Law (2005), Rule 107. See also Baxter, p. 329; Levie, p. 37; Rosas, p. 354; and Corn/Watkin/Williamson, p. 57.

[82] Henckaerts/Doswald-Beck, commentary on Rule 107, p. 390.

conflict is not, however, in itself unlawful under international law. It is defined as 'gathering or attempting to gather information in territory controlled by an adverse party through an act undertaken on false pretences or deliberately in a clandestine manner'.[83] This rule was already recognized in the Lieber Code, the Brussels Declaration, the Oxford Manual and the Hague Regulations.[84]

989 If, however, spies rejoin the armed forces to which they belong and are subsequently captured by the enemy, they must be treated as prisoners of war and incur no responsibility for their previous acts of espionage.[85]

990 Saboteurs are generally understood to be persons who are acting clandestinely or under false pretences behind enemy lines to commit acts of destruction or damage against the objects and material belonging to the enemy.[86] It can also include killing and kidnapping of the enemy. Although not expressly mentioned in Article 4, there is a well-established practice that saboteurs are treated in the same way as spies with regard to prisoner-of-war status.[87] Members of armed forces who are not in uniform while engaged in sabotage are unlikely to be given prisoner-of-war status if captured.[88]

991 It should also be noted that anyone who is not entitled to protection as a prisoner of war under the Third Convention is entitled to protection under the

[83] ICRC Study on Customary International Humanitarian Law (2005), Rule 107. See also Lieber Code (1863), Article 88; Brussels Declaration (1874), Article 19; Hague Regulations (1907), Article 29; and Additional Protocol I, Article 46.

[84] Lieber Code (1863), Article 88; Brussels Declaration (1874), Articles 19–20; Oxford Manual (1880), Articles 23–25; Hague Regulations (1899), Articles 29–30; and Hague Regulations (1907), Articles 29–30. See also Baxter, p. 329. It is also recognized in case law; see United States, Supreme Court, *Quirin case*, Judgment, 1942, pp. 31–35.

[85] Brussels Declaration (1874), Article 21; Oxford Manual (1880), Article 26; Hague Regulations (1899), Article 31; Hague Regulations (1907), Article 31.

[86] For the definition of 'saboteurs' or 'sabotage', see e.g. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, p. 57; Canada, *LOAC Manual*, 2001, p. 6-3, para. 20; United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 63, para. 5.16; and United States, *Law of War Manual*, 2016, p. 149, para. 4.17.1.

[87] See e.g. United States, Supreme Court, *Quirin case*, Judgment, 1942, p. 37; United Kingdom, Judicial Committee of the Privy Council, *Ali case*, Appeal Judgment, 1968. See also the statements of the representatives of Norway and Switzerland at the Diplomatic Conference, who said that '[s]aboteurs could not of course claim protection' under the Convention; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 621. See, further, Canada, *LOAC Manual*, 2001, p. 6-3, para. 22; United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 63, para. 5.16; and United States, *Law of War Manual*, 2016, pp. 151–153, paras 4.17.3–4.17.5. See also Levie, pp. 36–37 and 82–83, and Baxter, pp. 338–340.

[88] Richard R. Baxter, 'The Privy Council on the Qualifications of Belligerents', *American Journal of International Law*, Vol. 63, No. 2, April 1969, pp. 290–296, at 294–295; Henri Meyrowitz, 'Le statut des saboteurs dans le droit de la guerre' *Revue de droit pénal militaire et de droit de la guerre*, Vol. 5, 1966, pp. 121–176, at 160–164. According to Meyrowitz, saboteurs out of uniform commit a war crime and can be punished for that act but remain prisoners of war. Meyrowitz acknowledges, however, that this is a minority view and that most of the doctrine assimilates saboteurs to spies. See also Yoram Dinstein, 'The Distinction between Unlawful Combatants and War Criminals', in Yoram Dinstein and Mala Tabory (eds), *International law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 103–116.

Fourth Convention, if they meet the conditions laid down in Article 4 of that Convention.[89] In any event, the protections in Article 75 of Additional Protocol I apply as a minimum. These protections are today considered part of customary international law.

5. *Deserters and defectors*

992 The question arises whether members of the armed forces who desert but subsequently fall into the hands of the enemy are to be granted prisoner-of-war status. This issue is not expressly addressed in the Third Convention, nor was it in the Hague Regulations or 1929 Convention before it.

993 It is common practice for persons to be punished for acts of desertion by the State on which they formerly depended. However, as a matter of domestic law, generally an act of desertion does not amount to a unilateral termination of one's membership in a State's armed forces.[90] Persons who desert remain members of the armed forces and are therefore entitled to prisoner-of-war status if they fall into enemy hands.[91] This conclusion can be found in some military manuals, which expressly confirm the entitlement of deserters to prisoner-of-war status.[92] The prisoner-of-war status of deserters must be maintained until their final release and repatriation, and prisoners of war may not renounce their rights.[93]

[89] For the definition of protected persons under the Fourth Convention, see Article 4 of that Convention. Persons without combatant status who have participated directly in hostilities are sometimes referred to as 'unlawful combatants'; see e.g. Rosas, pp. 305 and 311. For different views on the consequences of being a so-called 'unlawful combatant' or 'unprivileged belligerent', see e.g. Knut Dörmann, 'The legal situation of "unlawful/unprivileged combatants"', *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 45–74; Yutaka Arai-Takahashi, 'Unprivileged (unlawful) belligerents captured on a battlefield and the Geneva Conventions', *Israel Yearbook on Human Rights*, Vol. 48, 2018, pp. 63–103; Yoram Dinstein, 'The Distinction between Unlawful Combatants and War Criminals', in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 103–116, at 112; Richard R. Baxter, 'So-called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs', *British Yearbook of International Law*, Vol. 28, 1951, pp. 323–345, at 328–329 and 343–345; Knut Ipsen, 'Combatants and Non-Combatants', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edition, Oxford University Press, 2013, pp. 79–113, at 82–84; Henri Meyrowitz, 'Le statut des saboteurs dans le droit de la guerre', *Revue de droit pénal militaire et de droit de la guerre*, Vol. 5, 1966, pp. 121–176, at 159; and United States, *Law of War Manual*, 2016, pp. 160–164, para. 4.19.

[90] See e.g. France, *LOAC Manual*, 2012, p. 38.

[91] See e.g. Greenspan, p. 99, and Wilhelm, p. 29. See, however, Sassòli, 2019, pp. 257–258, who makes a distinction between persons who desert prior to falling into the power of the enemy and those who do so after. The former, he argues, become protected civilians.

[92] Australia, *Manual of the Law of Armed Conflict*, 2006, p. 10-4, para. 10.11; Canada, *LOAC Manual*, 2001, p. 10-3, para. 1011(2); France, *LOAC Manual*, 2012, p. 38; United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 147, para. 8.14; United States, *Law of War Manual*, 2016, pp. 114–115, para. 4.5.2.5.

[93] See Articles 5(1) and 7. See also Australia, *Manual of the Law of Armed Conflict*, 2006, p. 10-8, para. 10.32.

994 In circumstances where persons who deserted find themselves in the power of the enemy, certain protective measures must be taken. For example, it may be safer not to assemble them in the same camp as other members of the same armed forces.

995 A distinction is sometimes made between deserters and defectors. Defectors are persons from one side's armed forces who desert their own armed forces and voluntarily join the armed forces of the opposing side.[94] Because they have not 'fallen into the power of the enemy', they are not prisoners of war while serving in their new armed forces.[95] Those who defect after capture, however, retain their prisoner-of-war status because they may in no circumstances renounce the protection of the Convention.[96] Moreover, no prisoner of war or protected person may be compelled to serve in the forces of a hostile Power.[97]

996 The question arises as to what the status is of persons who have defected and who have subsequently been captured by other armed forces. Arguably, the fact that they have become members of the armed forces by defecting from another State's armed forces does not alter the application of Article 4A(1). Therefore, if they fall into the power of the enemy, be it the State from which they defected or another State, they become prisoners of war. There is practice, however, indicating that some States exclude defectors from their own armed forces from prisoner-of-war status, whether they do so independently of or in line with their view of the impact of nationality on that assessment.[98]

997 Whether a person is a deserter or a defector may be uncertain and a determination will need to be based on the available facts. If there is doubt whether a person is entitled to prisoner-of-war status, Article 5(2) will apply.

6. *Mercenaries*

998 Article 4 does not expressly address the status of 'mercenaries' who fall into the power of the enemy. Pursuant to Additional Protocol I and customary

[94] See e.g. Niebergall-Lackner, p. 23, and United States, *Law of War Manual*, 2016, p. 115, para. 4.5.2.6.

[95] Draper, 1958, p. 53; Detter, p. 157. See also Wilhelm, p. 29. See also United States, *Law of War Manual*, 2016, p. 115, para. 4.5.2.6, and p. 542, para. 9.3.4.1.

[96] See the commentary on Article 7, para. 1176. See also Australia, *Manual of the Law of Armed Conflict*, 2006, para. 10.32; Denmark, *Military Manual*, 2016, p. 483, para. 5.1.3.6; Canada, *LOAC Manual*, 2001, p. 10-3, para. 1011(2); and United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 147, para. 8.14.

[97] Third Convention, Article 130; Fourth Convention, Article 147. See also Niebergall-Lackner, p. 124.

[98] See e.g. United States, *Law of War Manual*, 2016, p. 114, para. 4.5.2.6 ('Defectors serving in the forces of the enemy who are captured by the State to which they originally owed an allegiance generally would not be entitled to POW status because the privileges of combatant status are generally understood not to apply, as a matter of international law, between nationals and their State of nationality.'), and pp. 540–541, para. 9.3.2.1; New Zealand, *Military Manual*, 2019, Vol. 4, p. 6-10, para. 6.3.26; and Greenspan, p. 99. For a discussion of nationality and being in the power of the enemy, see section C.2.

international law, mercenaries are not entitled to prisoner-of-war status.[99] Moreover, numerous military manuals specify that mercenaries are not entitled to this status.[100] Such exclusion is also noted in official statements and reported practice of States.[101] This does not preclude a State from granting mercenaries prisoner-of-war status, if it so chooses.[102] In any event, mercenaries are entitled to the protection of Article 75 of Additional Protocol I, whether as treaty or customary law.

E. Subparagraph 4A(2): Members of other militias or other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict

999 Article 4A(2) defines the second category of prisoners of war, namely those who are members of other militias or other volunteer corps, including those of organized resistance movements (hereinafter also referred to as 'groups'), belonging to a Party to the conflict and fulfilling the four conditions discussed below. The definition of this category of prisoner of war was an innovation in the Third Convention, expressly extending prisoner-of-war status to organized resistance groups, including those fighting against an Occupying Power, but only when such groups 'belong to' a State and fulfil the four conditions described in subparagraph 4A(2).[103] The listing of these conditions does not preclude a Detaining Power from granting prisoner-of-war status to persons who do not fulfil them.[104]

[99] Additional Protocol I, Article 47(1). This applies to mercenaries as defined in Article 47(2) of the Protocol. See also ICRC Study on Customary International Humanitarian Law (2005), Rule 108, and OAU Convention against Mercenarism (1977), Article 3.

[100] See ICRC, Customary International Humanitarian Law, Practice relating to Rule 108, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule108; Canada, *LOAC Manual*, 2001, p. 3-6, para. 319(2), and p. 10-2, para. 1007; Denmark, *Military Manual*, 2016, p. 176; Germany, *Military Manual*, 2013, para. 342; New Zealand, *Military Manual*, 2019, Vol. 4, pp. 6-20–6-21, para. 6.6.5(c); Philippines, *LOAC Teaching File*, 2006, p. 5-3; Sri Lanka, *Military Manual*, 2003, para. 625; and United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 47, para. 8.12. But see United States, *Law of War Manual*, 2016, p. 168, para. 4.21 (being a mercenary does not automatically deprive an individual of prisoner-of-war status if they otherwise qualify).

[101] See ICRC, Customary International Humanitarian Law, Practice relating to Rule 108, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule108.

[102] See e.g. United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 47, fn. 41, and p. 147, para. 8.12: '[Additional Protocol I, Article 47] does not prevent a party to a conflict extending PW status to mercenaries if it so wishes, see [Geneva Convention] III, Art 6.' See also Debuf, p. 209.

[103] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 479. There is a rich history of the negotiation of this paragraph, which is not reproduced here. See Pictet (ed.) *Commentary on the Third Geneva Convention*, ICRC, 1960, pp. 53–56. See also Levie, pp. 38–59. See also Gerald I.A.D. Draper, 'Combatant Status: An historical perspective', *Military Law and the Law of War Review*, Vol. 11, 1972, pp. 135–145, and Draper, 1971, p. 19.

[104] Baxter, p. 337. New Zealand, *Military Manual*, 2019, Vol. 4, p. 12-9, para. 12.2.11 and fn. 32, provides that persons not legally entitled to prisoner-of-war status may be granted this status 'by agreement or by unilateral decision'.

1000 The 1960 ICRC Commentary succinctly described the historical context and impetus for the adoption of Article 4A(2) thus:

> The opening years of the Second World War witnessed immense changes in the political system of Europe. Many countries were occupied, armistices were concluded and alliances reversed. Some Governments ceased to be, others went into exile and yet others were brought to birth. Hence arose an abnormal and chaotic situation in which relations under international law became inextricably confused. In consequence, national groups continued to take an effective part in hostilities although not recognized as belligerents by their enemies, and members of such groups, fighting in more or less disciplined formations in occupied territory or outside their own country, were denied the status of combatant, regarded as 'francs-tireurs' and subjected to repressive measures. The International Committee of the Red Cross always made every effort to secure for 'partisans' captured by their adversaries the benefit of treatment as prisoners of war, provided of course that they themselves had conformed to the conditions laid down in Article 1 of the Regulations annexed to the Fourth Hague Convention of 1907.[105]

1. *The requirement of 'belonging to'*

1001 To fall within the purview of Article 4A(2), the militia, volunteer corps or organized resistance movement must belong to a Party to the conflict.[106] This category concerns groups that are not incorporated into the armed forces but otherwise belong to the Party. The fact that the nature of this relationship does not amount to incorporation is clear from the differentiation between Article 4A(1) and 4A(2). Members of militias or volunteer corps that form part of the armed forces are expressly included in Article 4A(1).

1002 Historically, an 'express authorization . . . usually in writing' was required to establish a relationship between a State Party to an armed conflict and a group fighting on its behalf.[107] The 1874 Brussels Declaration was the first multilateral document to regulate the status of members of such groups. It included recognition of prisoner-of-war status for members of militias and volunteer corps provided that they met four conditions – the same as those listed in Article 4A(2).[108] Although the Brussels Declaration did not require express and written authorization of independent forces, there was no apparent intention to abandon the requirement that such forces 'fight *on behalf of* a

[105] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 52; ICRC, 'Report on the Efforts Made by the International Committee in behalf of "Partisans" taken by the Enemy', Geneva, October 1946, Series IV, No. 2, Annex 3 (translation).

[106] Namely, the enemy State. Recognition by the Detaining Power of the statehood of the enemy Power is not required. Article 4A(3) makes this clear in relation to regular armed forces; see paras 1041–1044 of this commentary.

[107] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 57. See also Rosas, p. 295; Levie, p. 44; Gillard, p. 534.

[108] Brussels Declaration (1874), Article 9.

belligerent state'.[109] This can be discerned from the continued interest in ensuring that the status of 'lawful combatants' was not extended to persons engaged in private wars.[110] The 1899 and 1907 Hague Regulations similarly included militias and volunteer corps within their definition of belligerents, provided they fulfilled the four conditions, but again were silent on the authorization required (if any).[111]

1003 During the Second World War, a number of resistance movements opposed the Occupying Powers. The relationship between these movements and the States or governments on behalf of which they saw themselves as fighting varied. In some cases, the State publicly acknowledged the resistance movement as fighting on its behalf; in others, the situation was less clear, for example because of uncertainty as to the status of a government in exile as a Party to the conflict or because there was no public acknowledgement of a relationship.[112] The aim of Article 4A(2) was to cover all of these cases.[113]

1004 The term 'belonging to' was introduced in the drafting of Article 4 to describe the relationship that so-called irregular armed forces and a Party to a conflict need to have for members of such groups to be entitled to prisoner-of-war status when they fall into the power of the enemy. The requirement that the group 'belong' to the State for the purpose of Article 4A(2) has been described as necessitating a *de facto* relationship.[114] The 1960 ICRC Commentary stated:

> It is essential that there should be a *de facto* relationship between the resistance organization and the [subject of] international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting.[115]

1005 For a group to belong to a Party to a conflict for the purpose of Article 4A(2), two things are required. First, the group must in fact fight on behalf of that

[109] Rosas, p. 296. See also Rogers, p. 107.
[110] Rosas, p. 296. See also Lester Nurick and Roger W. Barrett, 'Legality of Guerrilla Forces Under the Laws of War', *American Journal of International Law*, Vol. 40, No. 3, July 1946, pp. 563–582, at 567–570.
[111] Hague Regulations (1899), Article 1; Hague Regulations (1907), Article 1.
[112] See Levie, pp. 40–43, and Lester Nurick and Roger W. Barrett, 'Legality of Guerrilla Forces Under the Laws of War', *American Journal of International Law*, Vol. 40, No. 3, July 1946, pp. 563–582, at 579–582.
[113] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 57; Levie, pp. 41–42.
[114] See e.g. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 57, and ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, by Nils Melzer, ICRC, Geneva, 2009, p. 23.
[115] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 57. The term 'subject of' inserted here corrects a mistranslation from the original French, 'le sujet de droit international'; see Pictet (ed.) *Commentaire sur la troisième convention de Genève*, ICRC, 1958, p. 64.

Party. Second, that Party must accept both the fighting role of the group and the fact that the fighting is done on its behalf.[116]

1006 Such acceptance may take different forms. First, the State's acceptance may be express. This can be a formal authorization or acknowledgement that the group fights on its behalf. For example, in a situation in which a group makes a public assertion that it fights on the State's behalf and the State expresses its 'approval' or 'endorsement', or gives it 'seal of official government approval', the State can be considered to have accepted that the group fights and does so on its behalf.[117]

1007 Second, acceptance of a *de facto* relationship may be tacit.[118] Tacit acceptance may arise where the State indicates by its actions that it accepts that the group fights on its behalf. For example, if a State enters into a contract with a group of civilians to perform a combat role, the act of contracting the group for such a purpose may constitute acceptance by the State that the group fights on its behalf. Another example of such acceptance would be where a group is involved in combat operations alongside the State and claims to be fighting on behalf of the State, and when given a formal, public or other opportunity to deny this link, the State does not or declines to do so.

1008 In some cases, the acceptance of the Party to the conflict that the group has a fighting role and fights on its behalf, will be demonstrated by the control that the State has over the group.[119] Where a Party to a conflict has overall control over the militia, volunteer corps or organized resistance movement that has a fighting function and fights on the State's behalf, a relationship of belonging for

[116] See Cameron/Chetail, p. 395; Debuf, p. 191; Del Mar, p. 111; Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*, Edward Elgar Publishing, Cheltenham, 2017, pp. 140–141; Canada, *LOAC Manual*, 2001, p. 3-2, para. 305(3); and Israel, Military Court, *Kassem case*, Judgment, 1969.

[117] Note that the mere delivery of equipment or military training would not be enough for a relationship of belonging to exist. See United States, *Law of War Manual*, 2016, pp. 120–121, para. 4.6.2. See also Denmark, *Military Manual*, 2016, p. 163 ('The affiliation may sometimes be established or ascertained on the basis of the State's acts and/or in the form of statements indicating such support or backing for the group.') Alternatively, the existence of some form of authorization may indicate that the group is in effect empowered to exercise elements of governmental authority, as set out in Article 5 of the 2001 ILC Draft Articles on State Responsibility.

[118] See Denmark, *Military Manual*, 2016, p. 163 ('No express agreement between the State and OAG [organized armed group] is required.'); United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 39, para. 4.3.3 ('[F]ormal state recognition is not essential and an organization may be formed spontaneously and appoint its own officers. The essential feature of the requirement is that the commander should accept responsibility for the acts of his subordinates and equally his responsibility to, and his duty of obedience to the orders of, the power or authority upon which he depends. Partisans or paramilitary forces acting on their own initiative do not comply with that requirement and so are not members of an armed force.'); and United States, *Law of War Manual*, 2016, pp. 120–121, para. 4.6.2. See also Del Mar, p. 111, and Levie, pp. 42–43.

[119] In relation to the meaning of 'control', see the commentary on common Article 2, paras 298–306.

the purposes of Article 4A(2) exists.[120] Members of such groups are thus entitled to prisoner-of-war status if they fall into the power of the enemy.

1009 Lastly, it is worth noting that the framework provided in Article 43 of Additional Protocol I is different with respect to the relationship between militias and volunteer corps and the State. While both Article 4A(2) of the Third Convention and Article 43 of Additional Protocol I refer to those who fight in the name of a Party to the conflict, Additional Protocol I does not differentiate between so-called 'regular' and 'irregular' armed forces. It provides instead that 'all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates' form part of the armed forces. For States party to both treaties, Articles 43–44 of Additional Protocol I do not replace Article 4 of the Third Convention; the articles continue to apply simultaneously.[121] Where a person falls within the definition of prisoner of war under Article 4 of the Third Convention but not under Articles 43–44 of Additional Protocol I, that person retains their protective status.

2. The four conditions

a. Introduction

1010 For members of militias and/or volunteer corps to benefit from prisoner-of-war status, the group to which they belong must collectively fulfil four conditions, in addition to meeting the requirement that the group itself 'belong' to the State.[122] During both the 1947 Conference of Government Experts and the 1949 Diplomatic Conference, the issue of any conditions for irregular armed forces to be afforded prisoner-of-war status was contentious. Possible conditions that were discussed included control of territory, responsible command, capability of being communicated with and of responding to communications, and/or whether there should be a minimum number of combatants.[123] Ultimately, States agreed to reuse the four conditions first framed in the 1874 Brussels Declaration and codified in the 1899 and 1907 Hague Regulations to define members of other militias and volunteer corps who qualify for prisoner-of-war status.

[120] See also Draft Articles on State Responsibility (2001), Article 8. In relation to the classification of conflicts, the ICRC considers the overall control test is appropriate because the notion of overall control reflects the real relationship between the armed group and the third State, including for the purpose of attribution. See the commentary on common Article 2, paras 298–306. It implies that the armed group may be subordinate to the State even if there are no specific instructions given for every act of belligerency.

[121] See Additional Protocol I, Article 44(6), and the discussion in Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 1722.

[122] Rosas, p. 333.

[123] See e.g. *Report of the Conference of Government Experts of 1947*, pp. 107–109, and *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 479 (Spain) and 561.

b. The individual or collective character of the requirement of compliance with the four conditions

1011 All four conditions under Article 4A(2), together with the requirement that the group belong to the State, must be fulfilled by the group collectively.[124] A failure to comply may be deemed to have occurred when there is large-scale or systematic non-fulfilment of the conditions by the group. In addition to how a group conducts its military operations, indicators that may be considered in this regard are whether it issues policies, gives official direction or promulgates instructions requiring its members to comply with the law and whether it acts to suppress violations. Individual instances of non-compliance would not preclude the members of a group as a whole from enjoying prisoner-of-war status under Article 4A(2).[125] As prisoner-of-war status is dependent on the group collectively meeting the requirements, a corollary is that compliance by one or a handful of individuals in the absence of group compliance does not entitle the compliant individuals to prisoner-of-war status.[126]

1012 In addition to the collective character of the requirement to comply with the four conditions, the second and third conditions dealing with distinction from the civilian population must also be fulfilled individually. Thus, individuals who fail to distinguish themselves from the civilian population or to carry their arms openly forfeit their entitlement to prisoner-of-war status. On the other hand, *individuals* who violate the laws and customs of war in the context of overall compliance by the group retain prisoner-of-war status.[127]

c. First condition: Responsible command

1013 The first of the four conditions is that the militia or volunteer corps must be commanded by a person responsible for their subordinates. This condition serves a protective purpose, as a structured hierarchy has the capacity to maintain internal discipline and to ensure that operations are planned, coordinated and carried out in a manner consistent with humanitarian law.[128] It also encourages accountability by commanders for the conduct of their subordinates.

[124] Draper, 1971, p. 197; Sassòli, 2019, para. 8.63; United States, *Law of War Manual*, 2016, pp. 118–119, para. 4.6.1.1.
[125] See e.g. New Zealand, *Military Manual*, 2019, Vol. 4, p. 6-9, para. 6.3.17. See also Rosas, p. 335.
[126] Draper, 1971, p. 197; Levie, p. 53; Rosas, p. 335; Sassòli, 2019, p. 253, para. 8.63; United States, *Law of War Manual*, 2016, pp. 118–119, para. 4.6.1.1. For a somewhat different view, see Dinstein, p. 160.
[127] See the commentary on Article 85, paras 3635–3641. In relation to the obligation to distinguish oneself, see paras 983–987 of this commentary.
[128] ICRC, 'Rules Applicable in Guerrilla Warfare', Document prepared for the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, CE/6, 1971, p. 11. See, generally, ICRC, *The Roots of Restraint in War*, ICRC, Geneva, June 2018. See also Draper, 1971, p. 201; Maia/Kolb/Scalia, p. 26; and United States, *Law of War Manual*, 2016, p. 121, para. 4.6.3.

1014 Indicators that groups have a responsible command include that the said command regularly orders, plans and leads military operations, conducts or supervises training and other activities and represses violations by subordinates.[129] It is important that commanders are in a position to ensure internal discipline, which in turn affects the way that soldiers conduct themselves in combat.[130] However, the command structure need not be sophisticated or rigid.

d. Second condition: Fixed distinctive sign recognizable at a distance

1015 The second condition requires that the group have a fixed distinctive sign recognizable at a distance. Together with the requirement to carry arms openly (discussed below), the requirement of having a fixed distinctive sign makes it easier to distinguish combatants from the civilian population.[131] This condition applies throughout military operations, including when members of a group are engaged in an attack or in a military operation preparatory to an attack. The obligation to wear a distinctive sign does not extend, for example, to times in which members of the group attend to personal hygiene, sleep or take part in physical training.[132]

1016 The sign must be 'fixed', meaning that it is not easily removed or disposed of 'at the first sign of danger'.[133]

1017 The sign must be 'distinctive', meaning that it should enable the identification of the person as belonging to the militia or volunteer corps. For that purpose, the sign must be exclusive to that group, in a way that effectively distinguishes it from the civilian population, it must be the same for all members of the group and it must have some degree of consistency over time.[134]

1018 The sign must be 'recognizable at a distance'. There is some discussion as to the distance from which the sign must enable the group to be recognizable, as the Convention does not provide any detail on this.[135] The core criterion is not

[129] Watts, p. 898; Levie, p. 45.
[130] This is complemented by the responsibility of commanders to prevent and punish the crimes of their subordinates. See the commentary on Article 129, para. 5121, and Additional Protocol I, Article 87(1).
[131] Rosas, p. 341; Watts, p. 899. See also Italy, *LOAC Elementary Rules Manual*, 1991, para. 2; Madagascar, *Military Manual*, 1994, Fiche No. 2, p. 8; South Africa, *LOAC Manual*, 1996, para. 26; Togo, *Military Manual*, 1996, Fascicule I, p. 13; and United States, *Law of War Manual*, 2016, p. 122, para. 4.6.4.1.
[132] See e.g. Argentina, *Law of War Manual*, 1989, para. 1.08(3); Canada, *LOAC Manual*, 1999, p. 3-2, para. 15; Colombia, *Instructor's Manual*, 1999, p. 16; Croatia, *Commander's Manual*, 1992, para. 2; Germany, *Military Manual*, 2013, paras 304 and 314; Hungary, *Military Manual*, 1992, p. 17; Italy, *IHL Manual*, 1991, Vol. 5, para. 5; Kenya, *LOAC Manual*, 1997, Précis no. 2, p. 8; Madagascar, *Military Manual*, 1994, Fiche no. 2-SO, para. A; New Zealand, *Military Manual*, 2019, Vol. 4, p. 6-9, para. 6.3.19; Sweden, *IHL Manual*, 1991, p. 36, para. 3.2.1.4; and Switzerland, *Basic Military Manual*, 1987, Article 26(1). See also Dinstein, pp. 53–54, and Rosas, p. 351.
[133] Levie, p. 48. See also Greenspan, p. 59.
[134] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 60; Watts, p. 899.
[135] See e.g. Denmark, *Military Manual*, 2016, p. 164, and United States, *Law of War Manual*, 2016, p. 123, para. 4.6.4.3 ('"Distance" has not been defined but may be interpreted as requiring that the sign be easily distinguishable by the naked eye of ordinary people at a distance at which the

that they can be seen by the opposing forces, but that in the event they are seen, they are not mistaken for civilians, nor for members of the enemy army. For example, the wearing of camouflage uniforms with a patch indicating nationality has long been accepted as fulfilling the requirement of the armed forces to distinguish themselves, notwithstanding that camouflage by nature is intended to blend into the surrounding environment. It would likewise be acceptable for other militias and volunteer groups under Article 4A (2) to be so attired.

1019 The wearing of a uniform is the simplest example of satisfying this requirement. Other examples include wearing a particular piece of clothing or insignia, provided that the piece of clothing or insignia is worn consistently, similar to a uniform, fulfils the other conditions mentioned above and effectively distinguishes the wearer from the civilian population.[136]

1020 If members of militias or volunteer corps are in vehicles that otherwise have the appearance of civilian vehicles, they must also ensure that these bear a distinctive sign.[137] There appears to be no formal requirement to notify the enemy of the distinctive sign. A proposal to add such a requirement was rejected at the 1907 Hague Peace Conference.[138] If notification is nevertheless made, 'it may avoid misunderstanding and facilitate claims of POW status for captured members of the armed group'.[139]

e. Third condition: Carrying arms openly

1021 The third condition is that members of militias carry their arms (or weapons) 'openly', meaning 'without concealment'.[140] This requirement serves to prevent combatants from giving the impression that they are civilians.[141] While the condition would be met by the use of a holster, it would not if weapons were hidden on the approach of the enemy.[142]

form of the individual can be determined.'). See also Levie, pp. 48–49; Maia/Kolb/Scalia, p. 29; Solis, p. 210; and Dinstein, p. 44. See also Australia, *Manual of the Law of Armed Conflict*, 2006, p. 5A-1 (Statement upon ratification of Additional Protocol I), para. 3; Belgium, *Law of War Manual*, 1983, p. 21; Denmark, *Military Manual*, 2016, p. 165; and New Zealand, *Military Manual*, 2019, Vol. 4, p. 12-35, fn. 158 (Statement upon ratification of Additional Protocol I).

[136] See also Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 1577 ('[A] cap or an armlet etc. worn in a standard way is actually equivalent to a uniform.'), and United States, *Law of War Manual*, 2016, p. 122, para. 4.6.4.1 ('For example, a helmet or headdress that makes the silhouette of the individual readily distinguishable from that of a civilian can meet this requirement. Similarly, a partial uniform (such as a uniform jacket or trousers), load bearing vest, armband, or other device could suffice, so long as it served to distinguish the members from the civilian population.').

[137] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 60. See also Watts, p. 900, paras 40–41.

[138] *Proceedings of the Hague Peace Conference of 1907*, Vol. III, p. 6.

[139] United States, *Law of War Manual*, 2016, p. 122, para. 4.6.4.1. See also Watts, pp. 900–901, para. 42.

[140] *Concise Oxford English Dictionary*, 12th edition, Oxford University Press, 2011, p. 1002.

[141] Dinstein, p. 39.

[142] See e.g. United States, *Law of War Manual*, 2016, pp. 123–124, para. 4.6.5. See also Henckaerts/Doswald-Beck, commentary on Rule 106, p. 386; Solis, p. 210; and Watts, p. 901.

1022 As with the condition of having a fixed distinctive sign, this condition applies throughout military operations, including for the time that the members are engaged in an attack or in a military operation preparatory to an attack.[143] It does not preclude members of militias and volunteer corps from being granted prisoner-of-war status if they are not carrying arms because they were not using them at the time of capture.

1023 This requirement is maintained in the rules on distinction adopted in Additional Protocol I, which addresses the exceptional situation in which 'owing to the nature of hostilities' armed combatants cannot distinguish themselves with a uniform, piece of clothing or distinctive sign.[144]

f. Fourth condition: Conducting operations in accordance with the laws and customs of war

1024 The fourth condition is that the armed group must conduct its operations in accordance with the 'laws and customs of war'. This term is not precisely defined. While many legal frameworks apply during armed conflicts, the laws and customs of war are usually understood to be synonymous with applicable international humanitarian law, both treaty and customary.[145]

1025 Similar to the condition of having a responsible command, the aim of the fourth condition is to encourage compliance with international humanitarian law. The protection that humanitarian law provides members of regular armed forces when they become prisoners of war is extended to so-called 'irregular forces', provided that these groups also respect and comply with the same rules and fulfil the other three criteria.

1026 As explained above, the conditions of Article 4A(2) attach to the group. Members of a militia or volunteer corps under subparagraph 4A(2) could only be disqualified from prisoner-of-war status if the acts of the group entail large-scale or systematic non-compliance with international humanitarian law. In other words, non-compliance by one member of a group would not disqualify all members of the group from prisoner-of-war status. In addition, *individuals* who violate the laws and customs of war in the context of overall compliance by the group retain prisoner-of-war status, although they may be prosecuted for war crimes.[146]

1027 In many armed conflicts, the enemy is accused of not complying with the laws and customs of war, such that particular care must be taken and good faith

[143] Additional Protocol I, Article 44(4). See also Customary International Humanitarian Law (2005), Rule 106.
[144] Additional Protocol I, Article 44(3), second sentence.
[145] Maia/Kolb/Scalia, p. 32. See also e.g. Ukraine, *Manual on the Application of IHL Rules*, 2004, para. 1.2.23.
[146] See the commentary on Article 85, paras 3635–3641.

used when making any determination of whether this condition has been met. In case of doubt, Article 5(2) applies.

F. The significance of the four conditions for personnel covered by subparagraph 4A(1)

1028 The difference in wording between subparagraph 4A(1) and 4A(2) seems to indicate clearly that respect for the four conditions is set out as a prerequisite for '[m]embers of other militias and members of other volunteer corps' that belong to a Party to the conflict to have prisoner-of-war status and not as conditions for members of the armed forces or members of militias or volunteer corps forming part of the armed forces covered by subparagraph 4A(1). It is of course generally expected that members of regular armed forces will comply with the obligations reflected in these conditions and that there may be individual consequences if they do not.[147] However, there is some disagreement regarding the consequences for the force as a whole if substantial numbers of them fail to do so. Put another way, while there is agreement that the four elements reflect *obligations* for all members of armed forces, it is not clear that they are also *collective conditions* for prisoner-of-war status for 'regular' or '4A(1)' armed forces.

1029 One view acknowledges that the requirements mentioned in paragraph 4A(2) are obligations on States for regular armed forces but considers that regular armed forces of a State never lose prisoner-of-war status collectively, no matter their level of compliance with the four conditions.[148] Under this view,

[147] See e.g. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 58 (the Article 4A(2) requirements reflect 'the principal characteristics generally found in armed forces throughout the world, particularly in regard to discipline, hierarchy, responsibility and honour'); United States, *Law of War Manual*, 2016, p. 120, para. 4.6.1.3 ('the [Article] 4A(2) conditions were intended to reflect attributes of States' armed forces'); and Hague Regulations (1907), Article 1 ('The laws, rights, and duties of war apply … to armies.').

[148] George H. Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', *American Journal of International Law*, Vol. 96, No. 4, October 2002, pp. 891–898, at 895–896; Mallison/Mallison, p. 20; Gerald I.A.D. Draper, 'The Present Law as to Combatancy', in Michael A. Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the late Professor Colonel G.I.A.D. Draper, OBE*, Kluwer Law International, The Hague, 1998, pp. 196–201, at 197; Robert K. Goldman and Brian D. Tittemore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, American Society of International Law, December 2002, p. 10; Yutaka Arai-Takahashi, 'Disentangling legal quagmires: The legal characterisation of the armed conflicts in Afghanistan since 6/7 October 2001 and the question of prisoner of war status', *Yearbook of International Humanitarian Law*, Vol. 5, December 2002, pp. 61–105, at 78–80; Rogers, p. 112; Toman, pp. 283 and 285; Kubo Mačák, *Internationalized Armed Conflicts in International Law*, Oxford University Press, 2018, pp. 165–170; Ruth Lapidoth, 'Qui a droit au statut de prisonnier de guerre?', *Revue générale de droit international public*, Vol. 82, 1978, pp. 170–210, at 175: 'Aucune condition n'a été formulée pour la jouissance du statut de prisonniers par cette catégorie, bien que des obligations sévères lui soient imposes par le droit des conflits armés.' ('No condition was formulated for the enjoyment of prisoner-of-war status by this category, even though strict obligations were imposed on it by the law of armed conflicts.')

however, individuals can lose their right to prisoner-of-war status if they fail to distinguish themselves at the relevant times.[149] If large numbers (or an entire unit or group) fail to do so, each of those persons would lose prisoner-of-war status; however, even if only a handful were to wear uniforms or use a fixed, distinctive sign, all those who do so would remain eligible for prisoner-of-war status under this view.

1030 Another view considers that the regular 4A(1) force as a whole is liable to lose eligibility for prisoner-of-war status in the face of substantial non-compliance with any of the conditions set out in subparagraph 4A(2).[150]

1031 In respect of the obligation of distinction, the failure of significant numbers of members of an armed force to comply would lead to similar – even if not entirely identical – results under the two views. When it comes to the obligation to conduct operations in accordance with the laws and customs of war, however, the views lead to very different results. Under the first view, members of the force will be prisoners of war when in enemy hands even in the face of allegations of substantial non-compliance with humanitarian law by the whole force, but individuals may be prosecuted for war crimes. Under the second view, non-compliance with humanitarian law by a substantial part of the force means that the force as a whole does not qualify for prisoner-of-war status, including those individuals in the force who do comply with that law.[151]

1032 Those who favour the second view, i.e. who consider that the requirements in paragraph 4A(2) also reflect collective conditions for prisoner-of-war status for members of regular armed forces under paragraph 4A(1), base their assessment on a number of factors. They point out that the requirements listed in paragraph 4A(2) are considered to be implicit or inherent in the composition of forces that will fall under paragraph 4A(1).[152] The criteria may be said to reflect the attributes of regular armed forces.[153] In addition, there is case law in some

[149] See e.g. Levie, pp. 36–37.

[150] Yoram Dinstein, 'Unlawful Combatancy', *Israel Yearbook on Human Rights*, Vol. 32, 2002, pp. 247–270, at 255; Watkin, pp. 40–41; Schmitt, p. 16; Ruth Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions', *American Journal of International Law*, Vol. 96, 2002, pp. 328–337, at 335; Ohlin, p. 349; Corn/Watkin/Williamson, p. 57.

[151] Failing to distinguish is also a violation of the laws and customs of war but as a distinct criterion may logically be assessed separately. See Levie, p. 37, fn. 144: 'A distinction must be made between a conventional war crime allegedly committed by an individual concededly within the purview of Article 4 who, under Article 85, retains prisoner-of-war status at least until convicted ... and other types of offences such as acting as a spy or saboteur while wearing civilian clothes.'

[152] See e.g. Dinstein, p. 51 ('[T]here is a presumption that, by their very nature, members of regular armed forces would meet the conditions of eligibility to POW status. But the presumption can definitely be rebutted.'); Schmitt, p. 16 ('implicit' criteria); and Ohlin, p. 349 ('[T]he four requirements in Article 4(2) are already *implicit* in the definition of what counts as regular armed forces.').

[153] Indeed, this point was made in relation to paragraph 4A(3) in Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 63.

States that appears to apply the requirements to regular armed forces in determining the prisoner-of-war status of the individuals before it.[154]

1033 Those who favour the first view, and who consider that the conditions in paragraph 4A(2) do not apply as collective conditions for regular armed forces, even if they may reflect obligations on States and individuals, base their conclusion on the plain text and drafting history, as well as on practice and doctrine. It is clear from the text of the provision and from the preparatory work that the conditions in paragraph 4A(2) were not meant to apply as conditions for paragraph 4A(1), and the paragraphs were expressly split for that reason. During the drafting of Article 4, it was agreed that reference to regular armed forces be made in a separate subparagraph from that governing irregular armed forces to make it clear that only the latter group 'should fulfil all four conditions'.[155] The plain text of the provision does not attach any conditions apart from membership.[156] In addition, Article 85 provides that prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture retain the protection of the Third Convention even if convicted. This supports the understanding that members of regular armed forces are entitled to prisoner-of-war status even in the face of non-compliance and cannot be deprived of that status, and certainly not based solely on allegations.[157]

1034 Relevant case law supports the notion that the criteria in paragraph 4A(2) also reflect *obligations* for regular State armed forces, but it does not conclusively affirm that these are also *collective conditions* for prisoner-of war *status*. Rather, the *Quirin* and *Ali* cases address the narrower point of whether a member of regular armed forces must wear a fixed, distinctive sign and do not consider the applicability of the remaining three criteria – nor do they clarify whether they apply the distinction condition on a collective or individual basis.[158] Those cases can therefore also be read as affirming the first view. There is also, however, case law in which the conditions are applied

[154] United Kingdom, Judicial Committee of the Privy Council, *Ali case*, Decision, 1968, pp. 452–453; United States, District Court for the Eastern District of Virginia (Alexandria Division), *Lindh case*, Decision on Motion to Dismiss, 2002, pp. 557–558, and Supreme Court, *Quirin case*, Judgment, 1942, p. 12.

[155] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 466–467; see also *ibid.* p. 387.

[156] Pfanner, p. 114; LeBlanc, pp. 17–18; Watts, p. 894; Kubo Mačák, *Internationalized Armed Conflicts in International Law*, Oxford University Press, 2018, p. 167.

[157] This point is reiterated in Article 44(2) of Additional Protocol I, which provides that although combatants must comply with international humanitarian law, violations do not deprive them of their right to prisoner-of-war status; see Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, para. 1690.

[158] United States, Supreme Court, *Quirin case*, Judgment, 1942 p. 12; United Kingdom, Privy Council, *Ali case*, Decision, 1968, pp. 452–453. Levie, p. 37, fn. 144, points out that it is important to differentiate between the obligation to distinguish and 'other' violations of humanitarian law.

collectively,[159] as well as case law confirming that regular armed forces do not have to meet the conditions in order to enjoy prisoner-of-war status.[160]

1035 In terms of practice, virtually no State has denied prisoner-of-war status to members of the regular armed forces of a State on the grounds that those forces had not fulfilled the conditions.[161] Indeed, notwithstanding the widespread accusations of non-compliance made between Parties to the conflict, prisoner-of-war status was not denied on this basis to members of the regular armed forces as a whole during the Second World War nor in most international armed conflicts since.[162] A potential exception is the situation of the Taliban in the armed conflict with the United States, though it is not entirely clear whether they were seen as falling under paragraph 4A(1) or 4A(2).[163]

1036 The practice of States as expressed in military manuals also does not settle the question definitively. The military manuals of some States not party to

[159] United States, District Court for the Eastern District of Virginia (Alexandria Division), *Lindh case*, Decision on Motion to Dismiss, 2002, pp. 557–558.

[160] United Kingdom, Military Court at Hamburg, *von Lewinski case*, Judgment, 1949, pp. 515–516 ('Regular soldiers are so entitled without any of the four requirements set out in Art. 1 [of the Hague Regulations]; they are requisite in order to give the Militia and Volunteer Corps the same privileges as the Army.').

[161] Watts, p. 895.

[162] *Ibid.* During the Vietnam War, North Vietnam refused to grant prisoner-of-war status to captured American pilots because, as 'aggressors', they had allegedly committed war crimes; see ICRC, 'The International Committee and the Vietnam Conflict', *International Review of the Red Cross*, Vol. 6, No. 65, 1966, p. 403. See also Levie, pp. 37–38: 'There is no legal basis whatsoever for denying the benefits and safeguards of the Convention to acknowledged members of regular armed forces on the ground that they are guilty of making "aggressive war" and are, therefore, "war criminals," as was done by the North Vietnamese during the hostilities in Vietnam (1965–73).'

[163] See United States, Department of Justice, 'Application of Treaties and Laws to al Qaeda and Taliban Detainees', Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, p. 31:

> [The President] could interpret Geneva [Convention] III, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by article 4. . . .
>
> . . . Some of the facts which would be important to such a decision include: whether Taliban units followed a recognizable, hierarchical command-and-control structure, whether they wore distinctive uniforms, whether they operated in the open with their weapons visible, the tactics and strategies with which they conducted hostilities, and whether they obeyed the laws of war. If your Department were to conclude that the Afghanistan conflict demonstrated that the conduct of the Taliban militia had always violated these requirements, you would be justified in advising the President to determine that all Taliban prisoners are not POWs under article 4.

See also United States, District Court for the Eastern District of Virginia (Alexandria Division), *Lindh case*, Decision on Motion to Dismiss, 2002, pp. 557–558. Michael J. Matheson, 'U.S. Military Commissions: One of Several Options', *American Journal of International Law*, Vol. 96, No. 2, 2002, pp. 354–358, at 355, fn. 8 (suggesting that the reason for the denial of status was that, '[p]resumably, the administration considers Taliban forces not to be "regular armed forces"'); and John B. Bellinger III, 'The Work of the Office of the Legal Adviser' (blog post), *Digest of United States Practice in International Law*, January 2007 (stating expressly that '[t]he Taliban is better conceptualized as a militia belonging to a Party to the conflict, which would be eligible for POW protection under Article 4(A)(2) if they used a command hierarchy; wore a uniform or distinctive sign; carried arms openly; and observed the laws and customs of war'.).

Additional Protocol I indicate that they consider there are conditions for members of a State armed force to be granted prisoner-of-war status.[164] While these manuals do not assert that the 4A(2) conditions apply directly to 4A(1) forces, they indicate that the State will assess whether a State's armed forces have met similar conditions before granting prisoner-of-war status.

1037 Lastly, State practice based on the definition of armed forces in Article 43 of Additional Protocol I does not lead to a clear conclusion whether States party to the Protocol consider that the elements of the definition it contains also constitute collective criteria for regular armed forces. To recall, Article 43(1) states:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Some of these elements correlate to some extent to the four conditions in Article 4A(2). Some States party to Additional Protocol I include the elements of Article 43 as part of the definition of armed forces, without indicating whether compliance with those elements is also a precondition for prisoner-of-war status;[165] some do not include the element of having a disciplinary system that enforces humanitarian law as a condition for prisoner-of-war status in their military manuals, although some do include an individual condition of distinction, which is not part of the definition in Article 43;[166] and some make it explicit that these are criteria constituting conditions for prisoner-of-war status.[167] The record of the debates during the negotiation of what became Article 43 shows a similar divide among views as to whether the elements of

[164] Israel, *Manual on the Rules of Warfare*, 2006, p. 31. Sri Lanka, *Military Manual*, 2003, p. 12-13; Turkey, *LOAC Manual*, 2001, chapter 6(2), p. 40; United States, *Law of War Manual*, 2016, pp. 119–120, para. 4.6.1.3. The US manual acknowledges the drafting history indicating that the conditions in 4A(2) do not apply to the forces defined in 4A(1) and states: 'Nonetheless, the [Third Geneva Convention, Article] 4(A)(2) conditions were intended to reflect attributes of States' armed forces.'

[165] Côte d'Ivoire, *Teaching Manual*, 2007, Vol. III, pp. 2729; Denmark, *Military Manual*, 2016, paras 5.1.3 and 5.1.3.1.

[166] Of these, some reproduce Article 4A of the Third Convention and others include a criterion of distinction for all. See Australia, *Manual of the Law of Armed Conflict*, 2006, para. 10.6; Cameroon, *Instructor's Manual*, 2006, paras 211 and 241; Canada, *LOAC Manual*, 2001, p. 10-2, para. 1006, and pp. 3-1–3-2, paras 303 and 304, and *Prisoner of War Handling Manual*, 2004, para. 109; Chad, *Instructor's Manual*, 2006, pp. 59 and 42; France, *LOAC Manual*, 2012, pp. 76 and 32; Ireland, *LOAC Manual*, 2005, part 5; Madagascar, *Military Manual*, 1994, p. 55; Peru, *IHL Manual*, 2004, para. 34; Sierra Leone, *Instructor Manual*, 2007, pp. 24 and 40; and South Africa, *Revised Civic Education Manual*, 2004, paras 47a and 75.

[167] New Zealand, *Military Manual*, 2019, Vol. 4, p. 6-9, para. 6.3.18; Spain, *LOAC Manual*, 2007, pp. I-15–I-16, specifying that the requirements for being considered a 'lawful combatant' stem from Article 43 of Additional Protocol I.

the definition should or do constitute collective conditions for prisoner-of-war status.[168]

1038 From a teleological perspective, the proponents of each view strongly believe that their interpretation better protects civilians by promoting better compliance with humanitarian law.[169]

1039 It is the ICRC's view, based on its reading of all of the above, that the four conditions listed in Article 4A(2), while they are obligations, are not collective conditions for prisoner-of-war status to be granted to regular Article 4A(1) armed forces or militias or volunteer corps forming part of them. If and when regular armed forces are perceived as not fulling these obligations, avenues other than a collective denial of prisoner-of-war status are available to States under international law to endeavour to induce compliance. The entitlement of regular armed forces to prisoner-of-war status provides an important incentive for combatants to comply with internationational humanitarian law; collectively denying it removes that incentive and risks increasing the danger of non-compliance. The conditions also reflect the usual practice of State armed forces, and armed forces will generally conform to them. A State's armed forces are by definition commanded by a person responsible for their subordinates.[170] As noted above (section D.3), members of the armed forces are under an obligation to distinguish themselves sufficiently from the civilian population and not to conceal their weapons during military operations.[171] If individuals do not do so, they lose their entitlement to prisoner-of-war status on an individual basis. Compliance with the laws and customs of war is likewise a standard requirement under both the Geneva Conventions and general international law for members of the armed forces of every State Party and is essential for the functioning of the Conventions.[172] The Third Convention contains several provisions specifically aimed at enhancing compliance.[173] Nevertheless, non-compliance with the laws and customs of war does not result in the loss of prisoner-of-war status for members of the armed forces.[174]

[168] See e.g. *Official Records of the Diplomatic Conference of Geneva of 1974–1977*, Summary Records of Committee III, Second Session, Vol. XIV, Annex, pp. 518–520, p. 520 (Finland), and pp. 535–536 (Israel).

[169] The argument was expressed at the 1977 Diplomatic Conference; see *ibid.* pp. 535–536 (Israel).

[170] This is explicitly provided for in Additional Protocol I, Article 43(1). See also Customary International Humanitarian Law (2005), Rule 4, and Sassòli, 2019, p. 254, para. 8.65.

[171] See paras 983–987 of this commentary.

[172] See common Article 1 and Vienna Convention on the Law of Treaties (1969), Article 26. This is further emphasized in Additional Protocol I, Article 43(1).

[173] See Article 127 (dissemination) and Article 129 (penal sanctions). In relation to the Third Convention specifically, see also Article 41 (posting of the Convention) and Article 126 (supervision).

[174] See also Maia/Kolb/Scalia, p. 31. Some manuals provide a limited exception; see e.g. New Zealand, *Military Manual*, 2019, Vol. 4, p. 6-9, paras 6.3.17–6.3.18 ('Where an opposing force engages in widespread or general disregard for LOAC, this may indicate that it does not have an internal discipline system which enforces respect for LOAC. In an extreme case, that may mean that the group cannot be regarded as an armed force for legal purposes.'), and United States, *Law of War Manual*, 2016, pp. 119–120, para. 4.6.1.3 ('If an armed force of a State systematically

To consider that non-compliance results in a loss of status would severely compromise the protective effect of the Third Convention, as belligerents often accuse one another of not complying with the laws and customs of war.[175]

1040 The above considerations also apply to persons covered by Article 4A(3). The distinct conditions for prisoner-of-war status for persons covered by Article 4A (4)–(6) are set out in those subparagraphs.

G. Subparagraph 4A(3): Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power

1041 Members of the regular armed forces of a Party to an international armed conflict are included in the definition of prisoners of war under Article 4A(1), consistent with the Hague Regulations before it. The Second World War, however, saw the denial of prisoner-of-war status to certain groups on the basis that the authorities or governments to whom those armed forces pledged allegiance were not recognized by the enemy State.[176] To avoid a repetition of this abusive interpretation, it was suggested by the ICRC and ultimately accepted that it be expressly stated that all members of regular armed forces were owed prisoner-of-war status, irrespective of whether the enemy recognized the legitimacy of their government or other relevant authority.[177]

1042 Article 4A(3) covers armed forces that continue operations under the orders of a government in exile that is not recognized by the adversary but has been given hospitality by another State.[178] It also applies to situations of occupation, where the Occupying Power has recognized a different government in the part of the territory it occupies, or where the armed forces hold allegiance to a government that has ceased to exist.[179] It can also apply where a State exists but where the government in power may not be recognized as the legitimate government of the territory by other States that are party to the conflict.[180]

1043 In this sense, Article 4A(3) complements common Article 2. The failure by one State Party to recognize another is not a barrier to the classification of a conflict as an international armed conflict, nor to the recognition of

failed to distinguish itself from the civilian population and to conduct its operations in accordance with the law of war, its members should not expect to receive the privileges afforded lawful combatants.')

[175] See examples cited by Sassòli, 2019, p. 254, para. 8.65.

[176] For example, Germany denied prisoner-of-war status to French forces operating under the command of General de Gaulle and Italian units in southern Italy following the signing of an armistice between the Allies and Italy in September 1943; *Preliminary Documents submitted by the ICRC to the Conference of Government Experts of 1947*, p. 4. See also Levie, p. 59, and Maia/Kolb/Scalia, p. 33.

[177] *Preliminary Documents submitted by the ICRC to the Conference of Government Experts of 1947*, p. 4.

[178] Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 63.

[179] Levie, p. 60; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 415.

[180] See e.g. Ojeda, p. 361, and Bellal/Giacca/Casey-Maslen, p. 52, fn. 22.

prisoner-of-war status for members of the armed forces, other militias and other volunteer corps involved.[181]

1044 In the ICRC's opinion, and for the reasons discussed above, the four conditions in subparagraph 4A(2) do not attach collectively to regular armed forces covered by subparagraph 4A(3).[182]

H. Subparagraphs 4A(4) and (5): Civilian prisoners of war

1. *Differences between civilian and military prisoners of war*

1045 Subparagraphs 4A(4) and (5) concern two categories of persons: those who accompany the armed forces without actually being members thereof, and members of the merchant marine and the crews of civil aircraft of the Parties to a conflict. These civilians are the only two categories of persons who are entitled to prisoner-of-war status but not entitled to combatant status, immunity or privileges.[183] Their inclusion recognizes that their proximity to the armed forces increases the risk of their being interned with combatants, and makes explicit the protective framework that applies to them.[184]

1046 While the Convention includes these two categories of 'civilian' prisoners of war, most provisions in the Convention have been drafted with military prisoners of war in mind.[185] In relation to treatment, the Third Convention makes no distinction between prisoners of war who are combatants and those who are civilians. This may pose practical challenges with respect to how to implement the Convention's provisions for civilian prisoners of war. The Detaining Power must apply these provisions in good faith and in line with the rationale behind the provisions in question.[186]

2. *Subparagraph 4A(4): Persons accompanying the armed forces without being members thereof*

a. *General*

1047 A category of civilians entitled to prisoner-of-war status has existed in each of the early codifications of humanitarian law. The 1863 Lieber Code provided

[181] See the commentary on common Article 2, paras 265–268, in relation to the definition of 'State'.
[182] See para. 1039 of this commentary.
[183] See Additional Protocol I, Article 50(1). See also Lawrence Hill-Cawthorne, 'Persons Covered by International Humanitarian Law: Main Categories', in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, pp. 99–123, at 100.
[184] In Vietnam, for example, 51 of the 771 American and Allied forces captured were civilians; Solis, p. 213. See also Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, 2016, p. 50. In relation to the interning of such persons, see the commentary on Article 21, paras 1937–1938, and Debuf, pp. 225 and 239–240.
[185] See e.g. Articles 43, 60, 82 and 84.
[186] See e.g. the commentaries on Article 82, paras 3567 and 3608, and on Article 102, para. 4017.

that such status should be recognized for 'citizens who accompany an army for whatever purpose, such as sutlers [civilian merchants who sell provisions to the armed forces], editors, or reporters of journals, or contractors'.[187] The 1874 Brussels Declaration recognized '[i]ndividuals in the vicinity of armies but not directly forming part of them, such as correspondents, newspaper reporters, sutlers [or] contractors'.[188] The 1907 Hague Regulations and the 1929 Geneva Convention on Prisoners of War used the same terms as the Brussels Declaration[189] but required that such persons possess a certificate from the military authorities of the army they accompanied.

1048 Article 4A(4) likewise extends prisoner-of-war status to persons who accompany the armed forces without being members thereof, and provides a non-exhaustive list of examples of such persons and their activities. Today, in addition to services such as laundry, transportation, food and waste removal, contractors are used by some armed forces, for example for the development, maintenance and operation of technologically advanced equipment or vehicles.[190] There is disagreement among experts whether persons who are entitled to prisoner-of-war status by virtue of Article 4A(4) would lose their entitlement to that status if they were to participate directly in hostilities. As a matter of logic, as they are civilians, they do not have a right to participate directly in hostilities with immunity from prosecution for such acts. As noted above, anyone who is not entitled to protection as a prisoner of war under the Third Convention is entitled to protection under the Fourth Convention, if they meet the conditions laid down in Article 4 of that Convention.[191] In any event, the protections in Article 75 of Additional Protocol I apply as a minimum. These protections are today considered part of customary international law. A Detaining Power may nevertheless decide to grant such persons prisoner-of-war status.[192]

1049 War correspondents are included in the subparagraph as an example of persons accompanying armed forces. A distinction must be made between war correspondents, who are authorized by the armed forces without being members of it, and other journalists.[193] Upon falling into the hands of the

[187] Lieber Code (1863), Article 50.
[188] Brussels Declaration (1874), Article 34.
[189] Hague Regulations (1907), Article 13; Geneva Convention on Prisoners of War (1929), Article 81.
[190] Vernon, p. 371; Solis, p. 213.
[191] See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, by Nils Melzer, ICRC, Geneva, 2009, p. 38. See also Cameron/Chetail, pp. 434–435, and Watts, p. 907.
[192] W. Hays Parks, 'Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces', Expert Paper presented at the ICRC's Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, October 2005; Geoffrey S. Corn, 'Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions', *Journal of National Security Law and Policy*, Vol. 2, 2008, pp. 257–295, at 259.
[193] A contemporary example of the use of war correspondents would be the inclusion of journalists embedded with a unit of the armed forces who are authorized by those armed forces to

enemy, the former are prisoners of war, whereas the latter are civilians and may only be interned if absolutely necessary for reasons of security.[194]

1050 Persons accompanying the armed forces who fall into the power of the enemy are to be granted prisoner-of-war status only if they were authorized to accompany the armed forces.[195] Such authorization is evidenced by the provision of an identity card of a similar model to that annexed to the Third Convention (Annex IV.A). Possession of the identity card itself is not constitutive for prisoner-of-war status but merely helps to identify those entitled to that status. As recognized at the time of drafting, the identity card could easily be lost.[196] Authorization might also be evidenced by colocation, shared logistical arrangements, contractual arrangements and/or apparel.[197]

b. Private military and security companies

1051 Private military and security companies (PMSCs) have been defined as 'private entities that provide military and/or security services', including 'armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapon systems; prisoner detention; and advice to or training of local forces and security personnel'.[198] In principle, members of PMSCs might qualify for prisoner-of-war status under Article 4A(1) (if the PMSC is incorporated into the armed forces) or Article 4A(2) (if the PMSC is contracted to perform a combat role, belongs to the State and fulfils the four conditions of that subparagraph).[199] In practice, most PMSCs operate independently of the armed forces and are contracted in non-combat roles.[200] Personnel of PMSCs may be entitled to prisoner-of-war status under Article 4A(4) as persons accompanying the armed forces without being members thereof if they are authorized by the armed forces to accompany them, and depending on the functions they carry out.

accompany the unit and are provided with billeting, rations, etc. Such journalists would be entitled to prisoner-of-war status. See e.g. United States, *Law of War Manual*, 2016, pp. 173–174, para. 4.24.1.1.

[194] See Fourth Convention, Articles 42 and 78. See also Additional Protocol I, Article 79.

[195] The requirement of authorization by the armed forces would exclude for example any private contractors who have been hired by non-governmental organizations, by private companies, or even by government agencies other than defence departments (depending on internal laws); see Cameron/Chetail, pp. 419–421.

[196] See e.g. *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 238, 250 and 416. See also the commentary on Article 5(2), paras 1116–1118, in relation to persons who have not committed a belligerent act.

[197] Watts, p. 906.

[198] Montreux Document on Private Military and Security Companies (2008), Preface, para. 9.

[199] Cameron/Chetail, pp. 391–392. See also the discussion in relation to mercenaries, para. 998 of this commentary.

[200] See e.g. Jennifer K. Elsea and Nina M. Serafino, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, CRS Report for Congress, Congressional Research Service, Washington, D.C., 21 June 2007, and United States, 'Contractor Personnel Authorized to Accompany the US Armed Forces', Department of Defense Instruction 3020.41, 20 December 2011/31 August 2018. See also Watts, p. 907.

3. *Subparagraph 4A(5): Members of the merchant marine and crews of civil aircraft of the Parties to the conflict*

1052 The second group of civilian prisoners of war are members of the merchant marine and the crews of civil aircraft of the Parties to the conflict who do not benefit from other more favourable treatment under international law.

1053 'Merchant marine' refers to the ships and vessels of a State (including those which are landlocked) employed in commerce and trade.[201] In practice, during the First and Second World Wars, the merchant marine was considered necessary for maintaining national supplies, they were armed and were often the subject of attack. Members of the crew who were captured were sometimes treated as prisoners of war and sometimes as civilian internees.[202] Given both the importance of the 'merchant marine' and the practice of taking their crews prisoner, it was considered desirable that they be included in the categories of persons entitled to prisoner-of-war status.[203]

1054 The government experts similarly recommended the inclusion of 'civilian members of aircraft attached to the armed forces'.[204] The 1949 Diplomatic Conference followed this recommendation, conferring on them the status of prisoners of war rather than of civilian internees.[205] This category was included because 'civil aircraft are more and more frequently used instead of merchant cargo vessels for quick deliveries to the combat area, and the position of the two types of crews is, so far as relevant, identical'.[206]

1055 'Crew' in a maritime context refers to the company of seamen or women, or seafaring people, who crew a ship, vessel or boat.[207] Subject to what is stated in paragraph 1058, this should not be interpreted narrowly. The terms 'masters, pilots and apprentices' are expressly included 'in order to avoid too limited interpretations of the expression "crew"',[208] making it clear that all persons employed on a ship or civil aircraft are covered, from the officers in command to more junior staff. The provision does not, however, extend to any passengers on board.[209]

[201] See René de Kerchove, *International Maritime Dictionary*, 2nd edition, Van Nostrand Reinhold, New York, 1961, p. 506.
[202] Levie, p. 63, and Green, p. 194.
[203] See also *Report of the Conference of Government Experts of 1947*, pp. 110–111, and *Preliminary Documents submitted by the ICRC to the Conference of Government Experts of 1947*, p. 7.
[204] *Minutes of the Conference of Government Experts of 1947*, Committee II, Vol. III, 2nd meeting, p. 38; *Preliminary Documents submitted by the ICRC to the Conference of Government Experts of 1947*, p. 7. See also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 239 and 407.
[205] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 238–239 and 562.
[206] Levie, p. 63.
[207] René de Kerchove, *International Maritime Dictionary*, 2nd edition, Van Nostrand Reinhold, New York, 1961, p. 184.
[208] Ruud, p. 438.
[209] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 419.

1056 Article 4A(5) applies only to the members of the crew serving in the merchant marine or on the civil aircraft 'of the Parties to the conflict', with nationality of these vessels or aircraft being determined separately by applicable rules of international law. Thus, without prejudice to the fact that any of these individuals may qualify for prisoner-of-war status on the basis of another part of Article 4, Article 4A(5) does not apply to persons of enemy or neutral nationality serving as crew of neutral vessels or aircraft. Contemporary economic realities in the shipping industry are such that a vessel may be, and frequently will be, flagged in a neutral State. These individuals may not be taken as prisoners of war.[210]

1057 Historically, the law of naval warfare has, as a general rule, stated that neutral nationals serving as crew of an enemy merchant ship may not be made prisoners of war either.[211]

1058 The ICRC is of the view that persons entitled to prisoner-of-war status on the basis of Article 4A(5) are only those members of the crew whose professional activities are directly linked to the military activities of the armed forces. This includes all members of the crew involved in operating the vessel or aircraft.[212]

1059 Prisoner-of-war status on the basis of Article 4A(5) only applies where the person would not otherwise benefit from more favourable treatment under any other provisions of international law.[213]

1060 With some exceptions, all enemy merchant vessels or civil aircraft may be captured outside neutral waters – thus potentially providing for a wide scope of application of Article 4A(5).[214] At the same time, this provision does not abolish any 'exemptions from capture' existing in international law, i.e. in relation to vessels used exclusively for fishing along the coast or small boats employed

[210] For an analysis of which rules of international law apply to these persons today, see Anna Petrig, 'Economic Warfare at Sea and the Crew of the Merchant Marine', *International Law Studies* (forthcoming 2020).

[211] See Hague Convention (XI) (1907), Article 5(1): 'When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.' This rule is not absolute, however, since it does not apply in the circumstances outlined in Articles 5(2) and 8 of that Convention. An examination of whether these provisions can still be considered reflective of customary international law is outside the scope of the present Commentary.

[212] In this vein, see *Minutes of the Conference of Government Experts of 1947*, Committee II, Vol. III, 2nd meeting, p. 38: '[N]ous serons tous d'accord pour dire que ces . . . civils doivent être, d'une manière ou d'une autre, liés aux forces armées. On ne peut pas dire que la Convention s'étendra à tous les équipages civils d'un pays.' ('[W]e will all agree to say that these . . . civilians must be, in one way or another, linked to the armed forces. It cannot be said that the Convention extends to all the civilian crews of a country.')

[213] This reference is traditionally understood to be to Article 6 of Hague Convention (XI), which reads: 'The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.' See also San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), para. 165(d).

[214] See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), paras 135 and 141.

on local trade.[215] If a merchant ship is not or no longer exempt from capture in line with international law, such exemptions will not apply, and its crew would benefit from prisoner-of-war status should they fall into the power of the enemy.[216] Still, except where the merchant vessel or civil aircraft was involved in military activities, there is no reason why the crew should not benefit from the more favourable treatment and be released. The captor will need to assess whether the crew of the merchant vessel is likely to engage in activities that will help the military action of the enemy, and if it considers that internment is necessary for its security, it must grant the crew prisoner-of-war status.[217]

I. Subparagraph 4A(6): *Levée en masse*

1. *Introduction and historical background*

1061 The final category of persons covered by Article 4A are the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. The expression in French used most often in relation to this group, *levée en masse*, invokes the idea of a numerically significant resistance. The circumstances in which it may arise are limited.[218]

1062 This is a unique category, as it is the only group of persons recognized under Article 4A with full autonomy from the State.[219] However, persons belonging to this group do not require a command structure or fixed distinctive sign. For the purposes of the rules governing the conduct of hostilities, participants in a *levée en masse* are not civilians.[220]

[215] See *ibid.* para. 136(f); Hague Convention (XI) (1907), Article 3; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 419; and United States, Supreme Court, *The Paquete Habana*, Judgment, 1900, pp. 686 and 689–690. The US Supreme Court held, p. 686: 'By ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.'

[216] See Hague Convention (XI) (1907), Article 8, and San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), para. 137, for the conditions listed for vessels exempt from capture under para. 136 of the manual to benefit from said exemption. See also Rosas, p. 304.

[217] See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), pp. 229–230. See also Debuf, pp. 239–240.

[218] Maia/Kolb/Scalia describe the formulation in Article 4A(6) as the 'swan song' of the provision, see pp. 37–40.

[219] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, by Nils Melzer, ICRC, Geneva, 2009, p. 25: '[P]articipants in a *levée en masse* are the only armed actors who are excluded from the civilian population although, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces.' See also Debuf, pp. 202–203.

[220] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, by Nils Melzer, ICRC, Geneva, 2009: 'For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*

1063 The recognition of prisoner-of-war status for those who rise up against invading forces has a long history.[221] Nowadays, a number of commentators have suggested that advances in military technology render this provision obsolete as the potential for a meaningful civilian uprising as envisioned in Article 4A(6) is perceived to be slight.[222] However, it is submitted that this scenario should not be discarded: practice has suggested that even in circumstances where the invading force employs advanced military technology, the approach of an invading army could still prompt civilians to take up arms against it.[223]

2. *The conditions for a* levée en masse

a. *Temporal scope of a* levée en masse

1064 Article 4A(6) provides for the recognition of prisoner-of-war status for people who take up arms within a narrow window of time, namely during the actual invasion period.[224] If the resistance continues after this window, when the inhabitants have had time to organize into regular armed units, Article 4A(6) loses its relevance. The inhabitants must either be replaced by the regular armed forces of their State, formally integrate into them or form groups which meet the conditions of Article 4A(2).[225] Civilians who spontaneously take up arms after the enemy has established itself cannot qualify as prisoners of war for the purposes of Article 4A(6).[226]

1065 A *levée en masse* can occur in any part of a territory that is not yet occupied, or in an area where the previous Occupying Power has lost control over the administration of the territory and is attempting to regain it. If a situation of occupation is established, notwithstanding the best efforts of the uprising, persons cannot continue the fight in an unorganized fashion and retain their

are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.'

221 See Lieber Code (1863), Article 51; Brussels Declaration (1874), Article 10; Oxford Manual (1880), Article 2(4); and Hague Regulations (1907), Article 2. See also *Report of the Conference of Government Experts of 1947*, p. 107, and *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 239. See also Crawford, pp. 342 and 347; and Spaight, pp. 38–41.

222 See e.g. Maia/Kolb/Scalia, pp. 40–41; Levie, p. 64; and Crawford, p. 60. Crawford suggests, for example, that while previously sabres and muskets might meaningfully be defended against, little can be done by civilians spontaneously to defend themselves against aerial bombardment, high-powered weaponry and armoured vehicles.

223 See e.g. Solis, p. 216.

224 For example, in relation to Srebrenica, the ICTY considered that 'while the situation in Srebrenica may be characterised as a *levée en masse* at the time of the Serb takeover and immediately thereafter in April and early May 1992, the concept by definition excludes its application to long-term situations'; *Orić* Trial Judgment, 2006, para. 136. See also David, p. 479, and Maia/Kolb/Scalia, p. 38.

225 Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 68.

226 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 562.

protected status under Article 4A(6).[227] The expectation is that on the establishment of an occupation, only those that form armed units consistent with Article 4A(2) will be entitled to prisoner-of-war status if they fall into the power of the enemy.[228]

b. The condition of spontaneity

1066 Only persons responding spontaneously to an approaching and invading enemy, i.e. those who have not had time to form themselves into regular armed units and who have not been organized in advance by organs of the State, are covered.[229] The requirement of spontaneity does not mean that the invasion or advance of the enemy has to be a surprise. Subparagraph (6) is also applicable to inhabitants who have been warned, provided they did not have sufficient time to organize themselves in advance in conformity with the conditions of Article 4A(2).

c. The condition to carry arms openly

1067 In relation to the requirement to carry arms openly, the commentary on subparagraph 4A(2)(c) (paras 1021–1023), is applicable here *mutatis mutandis*. This condition is of particular significance in relation to persons participating in a *levée en masse* as there is no corresponding obligation to have a fixed distinctive sign. Carrying arms openly helps to ensure that persons involved in a *levée en masse* are accorded the protections of prisoner-of-war status.[230]

d. The condition to respect the laws and customs of war

1068 The requirement to respect the laws and customs of war is substantively identical to that of Article 4A(2)(d). The commentary on that provision (paras 1024–1027) applies here *mutatis mutandis*.

J. Paragraph 4B: Persons in occupied or neutral territories

1069 Article 4B provides that two other categories of persons are not entitled to prisoner-of-war status as such but must be treated as prisoners of war.[231]

[227] Hague Regulations (1907), Article 42.
[228] See Debuf, p. 241, and Ipsen, p. 93. See also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 239, at which point the suggestion to replace the term 'on the approach of the enemy' with 'in the presence of the enemy' was not accepted.
[229] Ipsen, pp. 92–93. For an assessment of whether the concept of *levée en masse* applies to 'a civilian population countering a massive cyber attack', see Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (2017), commentary on Rule 88.
[230] In relation to the internment of such persons, see the commentary on Article 21, para. 1936, fn. 25.
[231] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 561: Article 4B 'covers persons who find themselves already under the enemy's jurisdiction or who pass under

In the context of the Third Convention, 'treat[ment]' refers to all the obligations owed to prisoners of war under the Convention.[232]

1. *Subparagraph 4B(1): Armed forces of an occupied country*

1070 Article 4B(1) was included in response to a particular practice that occurred during the Second World War whereby demobilized troops of the occupied territory were subsequently interned by an Occupying Power because of their prior service in the armed forces of the occupied State.[233] It especially concerns current or decommissioned members of the armed forces in the occupied territory who are recaptured by the Occupying Power after trying to rejoin the active forces, or those who do not obey a summons with a view to their internment. As with Article 5, it seeks to preclude unjustifiably depriving of prisoner-of-war treatment persons who were previously interned as prisoners of war, then released, then interned again.[234]

1071 Article 4B(1) applies to anyone 'belonging, or having belonged, to the armed forces of the occupied territory'. Only the Power on which the prisoners belong, and not the Occupying Power, has the authority to decide whether a person no longer belongs to its forces.[235] The clarification that the provision applies to those 'having belonged' to such armed forces is important since they would not qualify for protection under Article 4A. Yet the provision also applies to persons still belonging to the armed forces of the occupied country: provided hostilities continue outside the territory occupied by the enemy Power, such persons will not be covered by Article 4A but exclusively by Article 4B(1).

1072 Nothing in Article 4B(1) should be read to limit the obligations of a Party to the conflict to release and repatriate prisoners of war after the cessation of active hostilities.[236]

2. *Subparagraph 4B(2): Internment by neutral Powers*

a. *Introduction*

1073 Article 4B(2) concerns persons covered by Article 4A who, instead of falling into and remaining in the power of the enemy, end up in the territory of a

the control of a neutral Power, but to whom, for practical reasons based mostly on experience, it seemed advisable to accord the same treatment as for prisoners of war'. See also *ibid.* p. 436, where they are referred to as 'persons assimilated to prisoners of war'. Furthermore, see Levie, p. 54, fn. 196 ('"Prisoner-of-war treatment" is not legally the equivalent of "prisoner-of-war status".'), and p. 69, fn. 269.

[232] See the commentary on Article 12, para. 1515.

[233] For the historical background that gave rise to the insertion of this paragraph, see *Report of the Conference of Government Experts of 1947*, p. 111, and *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 431–432. See also Sassòli, 2019, p. 261.

[234] See the commentary on Article 5, paras 1096–1098.

[235] Levie, p. 67.

[236] See Article 118.

neutral Power. Such persons are not entitled to prisoner-of-war status. The neutral Power, however, must accord them the treatment due to prisoners of war provided for in the Convention. While the neutral Power may decide to grant them better treatment than is required by the Third Convention, it does not need to comply with a number of its provisions.[237] This partial exemption from having to apply all of the Convention flows from the fact that a neutral Power is not an enemy State of the persons covered by Article 4B(2).[238]

1074 Based on the second sentence of Article 122(1), '[n]eutral or non-belligerent Powers who may have received within their territory persons belonging to one of the categories referred to in Article 4, shall … institute an official Information Bureau for prisoners of war who are in its power'.[239]

b. Historical background

1075 Prior to the Second World War, the only provisions of international law dealing with the status and treatment of fighters interned in the territory of a neutral Power were found in the 1907 Hague Convention (V)[240] and the 1929 Geneva Convention on Prisoners of War.[241] These provisions fell far short of entitling members of belligerent armed forces interned in neutral territory to be treated as prisoners of war.

1076 After the Second World War, during which over 100,000 members of various armed forces where interned in neutral States,[242] those provisions were considered 'wholly inadequate'.[243] For this reason, the 1947 Conference of Government Experts proposed that '[m]ilitary internees in neutral or non-belligerent countries' be entitled to the protection of what was to become the

[237] These provisions are dealt with in section J.2.e.

[238] See also Debuf, p. 237.

[239] Similarly, in line with the first sentence of Article 122(2), these Powers must '[w]ithin the shortest possible period … give [their] Bureau the information referred to in the fourth, fifth and sixth paragraphs of [Article 122] … with regard to persons belonging to [the categories referred to in Article 4] whom they have received within their territory'.

[240] Article 11 of the 1907 Hague Convention (V) states:

> A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.
>
> It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.
>
> It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

Article 12 of that Convention states: 'In the absence of a special convention to the contrary, the neutral Power shall supply the interned with the food, clothing, and relief required by humanity. At the conclusion of peace the expenses caused by the internment shall be made good.'

[241] Article 77 of the 1929 Geneva Convention on Prisoners of War provided: 'At the commencement of hostilities, each of the belligerent Powers and the neutral Powers who have belligerents in their care, shall institute an official bureau to give information about the prisoners of war in their territory.'

[242] Levie, p. 69.

[243] *Report of the Preliminary Conference of National Societies of 1946*, p. 81.

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Third Convention. This was said, however, to be 'subject to whatever exceptions may be justified by the non-enemy character of such countries'.[244]

1077 As of the draft adopted by the 17th International Conference of the Red Cross in Stockholm in 1948, these exceptions became clearly defined, by exempting a neutral Power from applying specifically designated provisions to military internees.[245] The 1949 Diplomatic Conference added that, when diplomatic relations exist between a Party to a conflict and a neutral Power that has interned a member of its military forces, the former will be entitled to perform, itself, the functions of a Protecting Power vis-à-vis such personnel.[246]

c. Persons covered by Article 4B(2)

1078 Subparagraph 4B(2) applies to persons covered by Article 4A in circumstances where a neutral Power is under an international legal obligation to intern them. It is immaterial how such persons ended up on the territory of a neutral Power and whether their presence is lawful or unlawful as a matter of international or domestic law. For example, their presence may be the result of a previous arrangement involving the consent of the neutral Power (for example based on Articles 109 or 111) or it may result from a situation of distress.

1079 This subparagraph only applies when the neutral Power has an obligation, as a matter of international law, to intern them. The relevant rule and legal justification for the neutral Power in this regard is Article 11(1) of the 1907 Hague Convention (V), which provides that '[a] neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war'.[247] It is outside the scope of this commentary to examine the current status of this provision. It can only be observed that, since 1907, States have not re-examined whether this rule still reflects the law.[248]

1080 The rationale behind the phrase 'required to intern under international law' relates to the fact that international law does not require a neutral Power to intern the categories of civilians referred to in Article 4A(4) and (5) of the Third Convention: 'These [persons] have a right to proceed on their journey to their own country.'[249] The purpose of this wording, therefore, was to ensure that the

[244] *Report of the Conference of Government Experts of 1947*, p. 104; see also the considerations at pp. 111–112.
[245] See *Draft Conventions adopted by the 1948 Stockholm Conference*, p. 53.
[246] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 436, and Vol. II-B, pp. 340–342.
[247] See also Hague Convention (XIII) (1907), Article 24, and Debuf, pp. 184–185 and 237.
[248] Similarly, see the commentaries on Article 15 of the Second Convention, section C.2, and on Article 17 of the Second Convention, section C.2.
[249] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 220.

neutral Power would need to determine for each particular person whether it has an obligation, on the basis of international law, to intern them.[250]

1081 It should be recalled that if persons are wounded, sick or shipwrecked, a neutral Power may also have obligations towards them based on Article 4 of the First Convention or Article 5 of the Second Convention, regardless of any separate obligation to intern them.

d. Neutral or non-belligerent Powers

1082 The term 'neutral Powers' is used in several provisions of the 1907 Hague Convention (V) and the 1949 Geneva Conventions without, however, having been defined anywhere in these treaties. As a matter of customary international law, 'neutral Power' refers to a State which is not a Party to an international armed conflict with the State in question.[251] Thus, Article 4B(2) can be considered to bind all States that are not Parties to an international armed conflict in the sense of common Article 2.[252]

1083 The binding nature of Article 4B(2) with regard to all these States does not depend on how they view or characterize their status as not being Parties to a particular conflict, i.e. whether they consider or have declared themselves to be 'neutral' in the sense of being bound by the rights and obligations of the law of neutrality. Nor is it affected by a State choosing to adopt a stance of so-called 'non-belligerency', regardless of whether doing so is lawful as a matter of international law.[253]

[250] See *ibid.* pp. 248–250.

[251] This definition corresponds to the ones reflected in recent restatements of international law drafted by independent groups of experts. See San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), para. 13(d); Manual on International Law Applicable to Air and Missile Warfare (2009), Rule 1(aa); and Helsinki Principles on the Law of Maritime Neutrality (1998), Article 1.1. Similarly, see Australia, *Manual of the Law of Armed Conflict*, 2006, para. 11.3; Canada, *LOAC Manual*, 2001, p. 12-13, paras 1302–1303; and United States, *Naval Handbook*, 2007, para. 7-1. Article 19 of Additional Protocol I similarly speaks of '[n]eutral and other States not Parties to the conflict' without affecting the meaning of the term 'neutral Power' in the Geneva Conventions. See also Michael Bothe, 'Neutrality: Concept and General Rules', version of April 2011, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, p. 1, http://www.mpepil.com: 'Neutrality means the particular status, defined by international law, of a State not a party to an armed conflict.' The Russian Federation's *Regulations on the Application of IHL*, 2001, refers to 'neutral States' without defining the term.

[252] For an international armed conflict in the sense of common Article 2(1) to exist, there is no requirement for there to have been a declaration of war; see the commentary on that article, section D.1.

[253] As indicated above, the criteria for determining whether a neutral State has become a Party to an international armed conflict are found exclusively in humanitarian law, not in the law of neutrality. Regarding so-called 'non-belligerency', see, with further references, Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 543–568, at 544: '[T]here is no basis for concepts such as "benevolent neutrality" or "non-belligerency"'. See also Yves Sandoz, 'Rights,

1084 Thus, the term 'non-belligerent Powers' is to be considered substantively identical to that of 'neutral Powers'.[254]

1085 These considerations are immaterial when it comes to determining the scope of application of Article 4B(2), a provision dealing with obligations of a humanitarian nature. The scope of application of Article 4 thus includes, but is not limited to, States considering themselves permanently neutral, States proclaiming themselves non-belligerent and States serving as Protecting Powers within the framework of Article 8. The same holds true if the UN Security Council has taken binding preventive or enforcement measures, such as sanctions or the authorization of the use of force, against a particular State under Chapter VII of the UN Charter. The exercise of these measures may lead to, or occur in the context of, a situation which qualifies as an international armed conflict. Irrespective of whether the law of neutrality needs to be complied with in these circumstances, Article 4B(2) is addressed to all, and can become relevant for any, States which are not Parties to an international armed conflict with the State in question and who find persons covered by this subparagraph on their territory.

e. Obligations of the neutral Power

1086 When the conditions of applicability outlined in paragraphs 1078–1079 have been met, the neutral Power must treat the persons in question as if they were prisoners of war. Thus, except for those provisions explicitly designated in Article 4B(2), the neutral Power must comply with all other provisions of the Third Convention.

Powers and Obligations of Neutral Powers under the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pp. 86–108, at 93. For a different view, see Natalino Ronzitti, 'Italy's Non-Belligerency during the Iraqi War', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff, Leiden, 2005, pp. 197–207.

[254] The Geneva Conventions use the phrase 'neutral or non-belligerent Powers' on two occasions: in the present paragraph, Article 4B(2), and in Article 122 of this Convention. This terminological difference has no substantive implications. See Yves Sandoz, 'Rights, Powers and Obligations of Neutral Powers under the Conventions', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pp. 86–108, at 92–93. Furthermore, Article 19 of Additional Protocol I applies to '[n]eutral and other States not Parties to the conflict'. The use of different terminology in Additional Protocol I does not affect the meaning of the term 'neutral Powers' in the Conventions; see Sandoz/Swinarski/Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, 1987, p. 61. See also Erich Kussbach, 'Le Protocole additionnel I et les Etats neutres', *Revue internationale de la Croix-Rouge*, Vol. 62, No. 725, October 1980, pp. 231–251, at 232–235, and Wolff Heintschel von Heinegg, '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality', in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 543–568, at 554. See also the commentaries on Article 4 of the First Convention, para. 916, and on Article 5 of the Second Convention, para. 961.

1087 As indicated by the words 'without prejudice to any more favourable treatment which these Powers may choose to give', the Third Convention provides a minimum standard of treatment. The neutral Power, in addition to being at liberty to grant them additional privileges, may be legally obligated to confer such treatment on the basis of other branches of international law, where these are applicable to prisoners of war in a neutral State, such as human rights law and refugee law.

1088 The neutral Power is not required to apply the following provisions of the Third Convention, regardless of whether it has diplomatic relations with the Power on which the prisoner(s) depend:

- Articles 15 and 30(5). Thus, the neutral Power need not provide free of charge for the maintenance or medical attention/treatment of an internee. The expenses incurred in this regard must be borne by the Power on which the person depends.[255] In practice, the details of such payments are best settled in a special agreement between the two Powers.[256]
- Articles 58–67, pertaining to the financial resources of prisoners of war. Thus, the practicalities of the prisoners' resources will in practice need to be settled in an agreement between the neutral Power and the Power on which the prisoner(s) depend.
- Article 92, dealing with disciplinary punishment after an unsuccessful escape. At face value, this exemption could be read to imply that the neutral Power may not punish an unsuccessful escapee. Yet, given that internment in the territory of a neutral Power may depend on the consent of the Power on which the prisoner(s) depend, it can be argued that the neutral Power may still punish an escape attempt under its domestic law – although the exact contours of this entitlement are not settled under current international law. The neutral Power can nonetheless still apply the penal and disciplinary sanctions provided for in Articles 82–108.[257]
- Articles 8, 10 and 126, dealing with Protecting Powers, substitutes for Protecting Powers and visits by their representatives to prisoners of war.

[255] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 244: '[W]hereas prisoners of war had to be maintained by the Detaining Power, neutral countries were entitled to have the cost of maintaining internees refunded to them by the country of origin.' Similarly, see the last sentence of Article 37 of the First Convention, Article 17(2) of the Second Convention and the last sentence of Article 49 of the Second Convention. See also Levie, p. 69, arguing that 'by eliminating these provisions as far as neutral Powers are concerned, Article 12 of the Fifth Hague Convention of 1907 remains applicable. … Presumably, this means that the neutral State will be reimbursed by the Power of origin for all expenses incurred for the maintenance and medical care provided to its military internees.'

[256] *Draft Conventions adopted by the 1948 Stockholm Conference*, p. 53.

[257] See also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 244: '[C]ertain neutral countries claimed that military internees should have more obligations towards them than had prisoners of war towards the Detaining Power. As far as punishments were concerned, such countries had sometimes held that it was not possible to punish escapes adequately by disciplinary action alone.'

> Thus, the neutral Power is under no obligation to allow a Protecting Power, or a substitute, to 'scrutinize' whether the prisoners are treated in compliance with the Third Convention.[258] In the ICRC's view, there is one exception to the foregoing, however, and this pertains to Article 126(4): Article 4B (2) should not be read to preclude the ICRC's right to visit persons covered by Article 4 who are held on the territory of a neutral Power.[259]

1089 Furthermore, where diplomatic relations exist between the Power on which the prisoners depend and the neutral Power, Article 4B(2) further exempts the neutral Power from having to apply all other (i.e. besides Articles 8, 10 and 126) provisions of the Third Convention that envision a role for the Protecting Power, yet only as far as that role is concerned. In that case, rather than a foreign State acting as Protecting Power, the Parties to a conflict on whom these persons themselves depend must be allowed to perform towards them the functions of a Protecting Power as provided for in the present Convention.[260] In other words, regular consular visits and diplomatic activities will continue, and this remains, as per the text of Article 4B(2), 'without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties'. Thus, the Party to the conflict in question is entitled to exercise both the 'Geneva mandate' and the 'Vienna mandate'.[261]

1090 Where no diplomatic relations exist between the neutral Power and the Party to the conflict in question, the neutral Power must comply with all the provisions in the Third Convention referring to the role of the Protecting Power, except Articles 8, 10 and 126 (the last as interpreted in para. 1088). For this purpose, the neutral Power should endeavour to appoint either a Protecting Power or a substitute in line with the procedure foreseen under the Geneva Conventions.[262] Failing this, it should ensure that the objective of involving a Protecting Power can still be achieved. To do so, it may invite an impartial humanitarian organization, such as the ICRC, to fulfil the same functions.[263]

[258] See also the commentary on Article 8, section E.1.b.

[259] See also Levie, p. 70: 'It is regrettable, however, that by including Article 126 among the excepted articles, the ICRC, with its wealth of expertise, has been deprived of the right to visit the military internee camps located in the territory of neutral Powers which maintain diplomatic relations with the Power of Origin.'

[260] For the list of these functions within the context of the Third Convention, see the commentary on Article 8, section E.4.

[261] See also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. III, p. 63, amendment 93: 'It is understood that the phrase "diplomatic relations" in these amendments and this note includes consular relations.' For an explanation of these types of mandates of Protecting Powers, see the commentary on Article 8, section C.

[262] See Articles 8 and 10.

[263] See Introduction, section A.3.e, in particular paras 50–51, and the commentary on Article 9, para. 1316.

K. Paragraph 4C: Medical personnel and chaplains

1091 Military medical and religious personnel who fall under Article 24 of the First Convention are members of the armed forces who 'shall be respected and protected in all circumstances'.[264] When they fall into enemy hands, they 'shall not be deemed prisoners of war' but – pending their repatriation based on the 'retention regime' to which they are entitled – must at least benefit by all the provisions of the Third Convention.[265] Technically, however, if it were not for this special status as 'members of the armed forces of a Party to the conflict', they meet the conditions of Article 4A(1) of the present Convention and would thus be entitled not only to the treatment but also to the status of prisoners of war. The purpose of this paragraph, therefore, is to avoid any contradiction on the matter.[266]

1092 The same rationale applies to staff of voluntary aid societies employed on the basis of Article 26 of the First Convention. They are not members of the armed forces, yet when they fall into enemy hands they may be retained based on the same conditions as in Article 28 of the First Convention and Article 33 of the Third Convention. If so retained, they do not have the status of prisoners of war but are entitled to be treated as such.

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[264] First Convention, Article 24. See also Article 37 of the Second Convention, dealing with the status of medical and religious personnel of vessels other than hospital ships.

[265] First Convention, Article 28, and Third Convention, Article 33.

[266] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, pp. 341–342, and Vol. II- B, p. 171.

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